Section 36(b) Litigation Since *Jones v. Harris*

An Overview for Investment Advisers and Fund Independent Directors

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Introduction

Section 36(b) of the Investment Company Act of 1940 (ICA) establishes a fiduciary duty on the part of fund advisers with respect to their receipt of fees, and grants fund shareholders the express right to bring lawsuits in federal court for breaches of this duty. Since section 36(b)'s enactment nearly half a century ago, the fund industry has experienced periodic "waves" of this type of lawsuit, as the plaintiffs' bar—i.e., those private lawyers and law firms who specialize in pursuing large-scale recoveries on behalf of investors against financial institutions—has developed and utilized an evolving series of legal theories in an effort to demonstrate that fees charged to mutual funds by their investment advisers are "excessive" in violation of the statutory provision.

Section 36(b) of the ICA

"[T]he investment adviser of a registered investment company shall be deemed to have a fiduciary duty with respect to the receipt of compensation for services, or of payments of a material nature, paid by such registered investment company or by the security holders thereof, to such investment adviser or any affiliated person of such investment adviser."

Under the legal framework (commonly known as the "*Gartenberg* standard") that has long been used by the federal courts to address and analyze alleged violations of section 36(b), the plaintiffs' bar has yet to obtain a final judgment against a fund adviser. In 2010, in its decision in *Jones v. Harris Associates L.P.*, the U.S. Supreme Court formally adopted this legal framework as the law of the land. At that time, many industry observers believed that the Court's unanimous ruling might dissuade the plaintiffs' bar from launching future section 36(b) challenges—except, perhaps, on an opportunistic and infrequent basis.

As it turns out, the plaintiffs' bar has not yet been dissuaded. To the contrary, the fund industry is now weathering a new wave of section 36(b) litigation of a size and intensity that many would not have anticipated in the immediate aftermath of *Jones v. Harris*. More specifically, in the six years since the Court's ruling, the plaintiffs' bar has initiated more than two dozen section 36(b) lawsuits against fund advisers (and/or their affiliates), most but not all of which are associated with fund groups that rank in the top one hundred fund groups as measured by assets under management. The great majority of these post-*Jones* lawsuits have been initiated since January 1, 2013; nearly a third have been initiated during the past twelve months alone. As of the date of this publication, over eighty percent of the post-*Jones* lawsuits remain pending.

It remains too early to predict when or how these pending post-*Jones* section 36(b) lawsuits will be finally resolved, or when the current wave of section 36(b) litigation may subside. The next twelve to eighteen months could provide substantially more information in this regard. At some point during this period—and very possibly, before year-end 2016—a federal district (i.e., trial) court is likely to issue a judgment in the first of the post-*Jones* lawsuits to have proceeded to trial. Meanwhile, two additional post-*Jones* lawsuits have reached the later stages of the litigation process, and certain others appear likely to do so during the upcoming twelve to eighteen months. As both a practical and a jurisprudential matter, the end-stage developments in these lawsuits may influence how litigants and courts address and resolve the post-*Jones* lawsuits that are currently in their earlier litigation stages. These end-stage developments may likewise influence whether, and to what extent, the plaintiffs' bar continues to initiate similar section 36(b) lawsuits against other fund advisers.

Frequently Asked Questions (FAQs)

This publication is structured as a series of FAQs, and is intended primarily for non-litigators, such as fund advisory personnel and fund independent directors. The publication is designed to assist readers in understanding how and why, notwithstanding the U.S. Supreme Court's 2010 decision in *Jones v. Harris Associates L.P.*, section 36(b) has reemerged in recent years as a significant litigation threat for the fund industry. Towards this end, the FAQs are divided into three sets of questions that explore (A) the function and meaning of section 36(b), (B) the long-running saga of *Jones v. Harris*, and (C) post-*Jones* developments in section 36(b) litigation. Case information included in this publication is current through June 30, 2016.

A. Section 36(b): Its Function and Meaning

1. What Is the Function of Section 36(b)?

The ICA "interposes fund independent directors as 'independent watchdogs' of the relationship between a mutual fund and its adviser."[1] In 1970, as part of a broader revision of the federal securities laws, Congress enacted section 15(c) of the ICA, which sets forth the role of fund independent directors in reviewing and approving advisory contracts of registered funds.[2] At the same time, Congress enacted section 36(b) of the ICA, which (1) creates a federal fiduciary duty on the part of fund advisers "with respect to the receipt of compensation for services …," and (2) expressly provides fund shareholders (as well as the U.S. Securities and Exchange Commission) with a right to bring lawsuits in federal courts against investment advisers "for breach of fiduciary duty in respect of such compensation …."[3]

> "[S]crutiny of investment-adviser compensation by a fully informed mutual fund board is the 'cornerstone of the … effort to control conflicts of interest within mutual funds.'"
>
> –Jones v. Harris, 559 U.S. 335, 348 (2010), quoting Burks v. Lasker, 441 U.S. 471, 482 (1979).

Taken together, these sections "bolstered shareholder protection."[4] Board scrutiny of adviser compensation under section 15(c) and shareholder lawsuits under section 36(b) can be viewed under the ICA as "mutually reinforcing but independent mechanisms for controlling conflicts."[5]

> "Congress added § 36(b) … because it concluded that shareholders should not have to 'rely solely on the fund's directors to assure reasonable advisory fees, notwithstanding the increased disinterestedness of the board.'"
>
> –Kamen v. Kemper Fin. Servs., 500 U.S. 90, 108 (1991) (citation omitted).

2. What Does Section 36(b)'s "Fiduciary Duty" Standard Mean?

Congress' adoption of a fiduciary duty standard in section 36(b) appears to have represented "a compromise between those urging an express written requirement that advisory fees be 'reasonable' and those who wanted a less stringent standard."[6] Yet section 36(b) does not itself define what it means for an adviser to "breach … [its] fiduciary duty in respect of … compensation." Nor does section 36(b) set forth the criteria that courts are to use in determining whether such a breach has occurred.[7]
As one commentator has noted, "[t]he 'studied ambiguity' of the Section's language, and the provision's 'tortuous legislative history,' left unclear [at the time that section 36(b) was enacted in 1970] what would be required to demonstrate that an advisory fee violated Section 36(b)."[8] As a result, the interpretation of section 36(b)'s fiduciary duty standard has been left largely to the courts.

The *Gartenberg* Standard:

"To be guilty of a violation of § 36(b), … the adviser-manager must charge a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining."

–Gartenberg v. Merrill Lynch Asset Mgmt., Inc., 694 F.2d 923, 928 (2d Cir. 1982).

The seminal court decision on section 36(b)'s fiduciary duty standard came in 1982, with a federal appellate court decision in *Gartenberg v. Merrill Lynch Asset Management, Inc*. There, the U.S. Court of Appeals for the Second Circuit established a test for "breach of fiduciary duty" under section 36(b) that has come to be known as the "*Gartenberg* standard": "To be guilty of a violation of § 36(b), … the adviser-manager must charge a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining."[9]

The Second Circuit instructed that "all pertinent facts must be weighed" in making this determination.[10] Over the decades that followed this decision, "something of a consensus … developed" in the federal courts with regard to the use of the *Gartenberg* standard in section 36(b) litigation.[11] But it was not until 2010, in *Jones v. Harris Associates L.P.*, that the U.S. Supreme Court itself directly addressed the question of the appropriate test for breach of fiduciary duty under section 36(b).

The *Gartenberg* Factors:

The *Gartenberg* court set forth a non-exhaustive list of six "factors"—the "*Gartenberg* factors"—for consideration in analyzing whether fees are "so disproportionately large" as to subject an adviser to liability under section 36(b). These factors, as characterized by the U.S. Supreme Court in *Jones v. Harris Associates, L.P.*, are as follows:

- nature and quality of services provided to the fund and its shareholders
- comparative fee structure
- profitability of the fund to the adviser
- "economies of scale" realized by the adviser
- "fall-out financial benefits" accruing to the adviser
- independence, expertise, care, and conscientiousness of the fund's board in evaluating adviser compensation

– Jones v. Harris, 559 U.S. 335, 344 & n.5 (2010).

B. *Jones v. Harris*: The Lawsuit

1. How Did *Jones v. Harris* Come Before the Supreme Court?

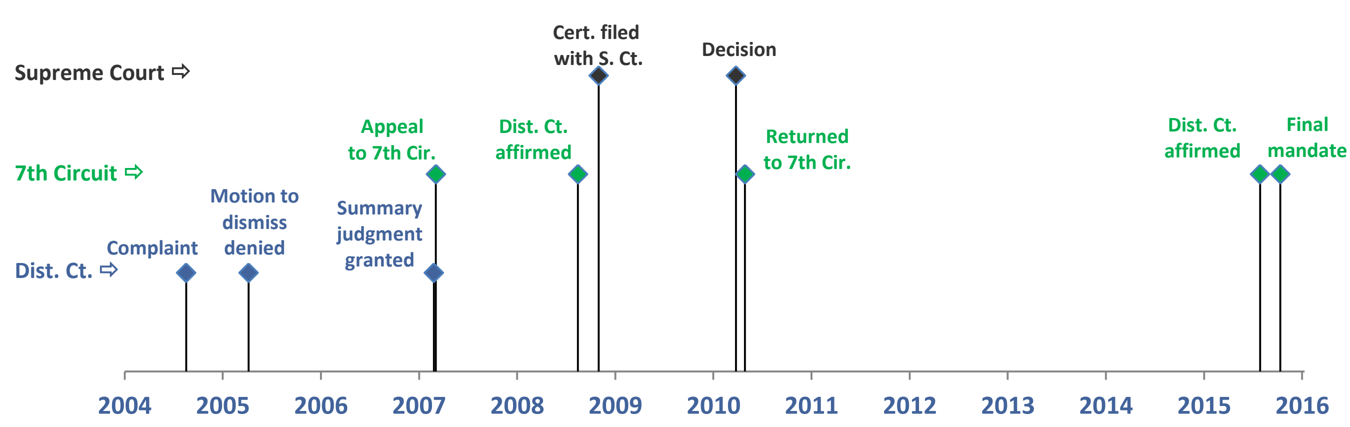
During the 2003-2005 market timing scandal period, the plaintiffs' bar initiated more than a dozen substantially similar section 36(b) lawsuits, including one, *Jones v. Harris Associates L.P.*, that was filed in federal district court in 2004. These scandal-period section 36(b) lawsuits alleged, in essence, that the fees charged by the advisers to their retail mutual funds were "excessive" by comparison to the lower fees charged by the advisers to their institutional and other non-mutual fund clients.[12]

The *Jones* lawsuit survived the defendant adviser's motion to dismiss (i.e., an early-stage legal attempt by a defendant to terminate the lawsuit by challenging the sufficiency of the plaintiffs' allegations on purely legal grounds). In 2007, after a lengthy period of discovery (i.e., the stage of the litigation process at which each party seeks to gather evidence from the other party and from experts and other non-parties), the federal district court granted summary judgment (i.e., a judgment issued prior to trial) in favor of the defendant adviser. The district court concluded, among other things, that the fees charged by the defendant adviser to its retail funds fell into an "acceptable range" when measured against both the fees charged by the adviser to its institutional accounts and the fees charged by other fund managers to retail funds.[13] The plaintiffs then appealed the district court's decision to the U.S. Court of Appeals for the Seventh Circuit.

By the time of the *Jones* appeal, nearly forty years had passed since section 36(b)'s enactment. Over the decades, the fund industry had clearly matured and evolved. Both inside and outside the fund industry, many had come to believe that market forces (and particularly competition among advisers) had come to operate as an independent and effective constraint on advisory fees, and they questioned how involved the federal courts should be in "second guessing" advisory fee levels under section 36(b) in light of these market forces. The appeal in *Jones* became a vehicle for two renowned Seventh Circuit judges to debate these and related issues.[14]

In 2008, the Seventh Circuit affirmed the district court's decision. In doing so, the appellate court rejected the *Gartenberg* standard in favor of a new, more market forces-oriented test for assessing "breach of fiduciary duty"

***Jones v. Harris* Timeline**



under section 36(b). The Seventh Circuit's new test called for courts to defer to advisory fee levels as negotiated and approved by fund independent directors, provided that an adviser "make[s] full disclosure and play[s] no tricks."[15] (The Seventh Circuit also addressed and essentially rejected the plaintiffs' argument that an adviser's lower fees for institutional accounts evidence the "excessiveness" of fees paid by the adviser's retail funds.[16])

The plaintiffs then submitted a petition to the U.S. Supreme Court seeking a review of the Seventh Circuit's decision, which petition was granted by the Supreme Court in March 2009. The parties submitted legal briefs to the Court, as did sixteen outside groups, including the U.S. government, the Investment Company Institute, the Independent Directors Council, and others.[17] (Eight of these *amicus curiae* briefs were submitted in support of the plaintiffs, and eight were submitted in support of the defendant adviser.) An oral argument was held before the Court in November 2009.

2. What Did the Supreme Court Decide in *Jones v. Harris*?

In March 2010, the Supreme Court issued a unanimous decision in *Jones v. Harris*. Broadly speaking, the decision can be summarized as follows:

> "The *Gartenberg* standard … may lack sharp analytical clarity, but we believe that it accurately reflects the compromise that is embodied in § 36(b), and it has provided a workable standard for nearly three decades."
>
> —Jones v. Harris, 559 U.S. 335, 353 (2010).

Adoption of the *Gartenberg*-Based Framework: The Supreme Court rejected the new, more market forces-oriented test formulated by the Seventh Circuit, and instead held that "*Gartenberg* was correct in its basic formulation of what § 36(b) requires."[18] In essence, the Supreme Court adopted the longstanding *Gartenberg*-based framework for addressing section 36(b) liability. Under this framework: (1) the *Gartenberg* standard—whether the challenged fee is "so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining"—is the test for what constitutes a "breach of fiduciary duty"; and (2) courts must consider "all relevant circumstances" in determining whether the standard has been violated, which may include consideration of the so-called *Gartenberg* "factors." In this regard, the Court's decision can be said to have essentially upheld the status quo.[19]

Guidance on Evaluating and Weighting Certain Factors: The Court provided guidance as to how courts in section 36(b) lawsuits should evaluate and weight: (1) a fund board's decision to approve a particular fee arrangement with its adviser; (2) comparisons between the challenged fees charged

> **Selected Guidance from the *Jones v. Harris* Decision**
>
> - *On a fund board's decision to approve a particular fee arrangement with its adviser:* The Court stated that "[w]here a board's process for negotiating and reviewing investment-adviser compensation is robust, a reviewing court should afford commensurate deference to the outcome of the bargaining process," and that "if the [fund independent] directors considered the relevant factors, their decision to approve a particular fee agreement is entitled to considerable weight, even if a court might weigh the factors differently."
> - *On comparisons between the challenged fees charged by the adviser to its fund(s) and the fees charged by that adviser to its "independent clients":* The Court stated that courts "may give such comparisons the weight that they merit in light of the similarities and differences between the services that the clients in question require, but … must be wary of inapt comparisons."
> - *On comparisons between the challenged fees charged by the adviser to its fund(s) and fees charged by other advisers to other mutual funds:* The Court stated that courts "should not rely too heavily on comparisons with fees charged to mutual funds by other advisers."
>
> —Jones v. Harris, 559 U.S. 335, 349-52 (2010).

by the adviser to its fund(s) and the fees charged by that adviser to its "independent clients" (e.g., institutional clients); and (3) comparisons between the challenged fees charged by the adviser to its fund(s) and fees charged by other advisers to other mutual funds.

Refusal to Enter the Broader Market Forces/Competition Debate: The Court declined to engage in the "market forces/competition" debate (i.e., the extent to which market forces/competition act as an independent and effective constraint on advisory fees). The Court viewed the debate as "a matter for Congress, not the courts" to resolve.[20]

3. What Happened in *Jones v. Harris* After the Supreme Court's Decision?

As a procedural matter, the Supreme Court in *Jones* vacated the Seventh Circuit's 2008 decision and remanded (returned) the lawsuit to the Seventh Circuit "for further proceedings consistent with" the Court's issued opinion. The lawsuit thereafter languished at the Seventh Circuit for more than five years. In August 2015, with an apology for the delay, the Seventh Circuit issued a four-page order in which the appellate court affirmed the district court's original (2007) grant of summary judgment in favor of the defendant adviser.[21]

In its order, the Seventh Circuit stated that the Supreme Court's approach in *Jones* "does not allow a court to assess the fairness or reasonableness of advisers' fees," but rather that "the goal is to identify the outer bounds of arm's length bargaining and not engage in rate regulation."[22] The Seventh Circuit concluded that the absence of any material dispute in the lawsuit over two propositions—i.e., that (1) the defendant adviser's fees were in line with those charged by advisers for comparable funds, and (2) the returns (net of fees) of the funds at issue exceeded the norm for comparable investment vehicles—"jointly suffice[d]" under the Supreme Court's standard in *Jones* to warrant affirmation of the district court's prior grant of summary judgment.[23]

The Seventh Circuit subsequently denied the plaintiffs' petition for rehearing,[24] thereby bringing the long-running saga of *Jones v. Harris* to a close.

4. Who Won *Jones v. Harris*—the Plaintiffs' Bar or the Fund Industry?

The answer to this question depends on one's perspective. In the immediate aftermath of the Supreme Court's 2010 decision, both the plaintiffs and the defendant in *Jones* "were quick to go to the press calling the Supreme Court's decision a victory for their position."[25] Similarly differing views as to who "won" the decision emerged in contemporaneous press reports and commentaries,[26] as well as in law journal articles published over the following months.[27]

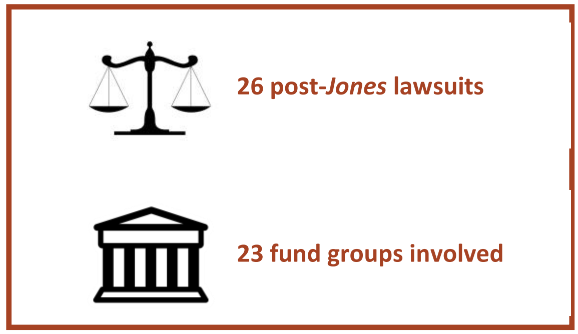
With the benefit of hindsight—and particularly when viewed within the overall context of decades of section 36(b) litigation between the plaintiffs' bar and the fund industry—*Jones* can perhaps be viewed as a case which neither side clearly lost. In this regard (and as both the plaintiffs' bar and the fund industry recognized in the run-up to the Supreme Court's ruling), it is important to note that there were other conceivable outcomes to *Jones* that could have been, for one side or the other, more injurious.

From the fund industry's perspective, the decision in *Jones* spared the industry the instability and inherent uncertainty that almost certainly would have attended any significant departure by the Supreme Court from the *Gartenberg*-based framework on which the industry had long relied. But the Court's decision also preserved section 36(b) as an available legal avenue for further exploration and potential use by a creative and tenacious plaintiffs' bar.

C. Post-*Jones* Developments in Section 36(b) Litigation

1. What Has Happened in Section 36(b) Litigation Since *Jones v. Harris*?

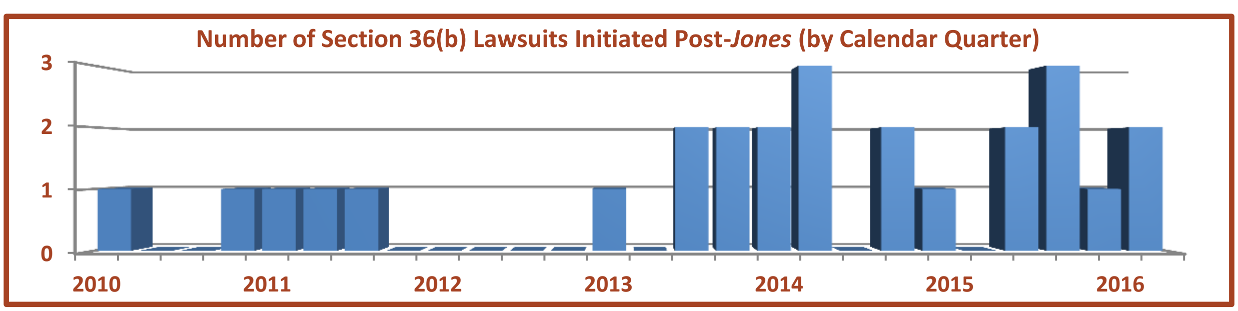
Over the six years since the Supreme Court's decision in *Jones*, the plaintiffs' bar has initiated twenty-six new section 36(b) lawsuits against fund advisers (and/or their affiliates). The defendants in these lawsuits are associated with twenty-three different fund groups, the great majority of which rank in the top one hundred fund groups as measured by assets under management. Twenty-one of these twenty-six post-*Jones* lawsuits have been initiated since January 1, 2013. Eight of these have been initiated during the past twelve months alone. As of the date of this publication, twenty-one of the twenty-six post-*Jones* lawsuits remain in progress.[28]



Different theories of liability have been advanced in the post-*Jones* lawsuits (with some lawsuits advancing more than one theory of liability). Broadly stated, however, these lawsuits can be viewed as falling into three basic categories:

"Manager-of-Managers" Lawsuits: The first category comprises lawsuits, sometimes referred to as "manager-of-managers" lawsuits, alleging that the defendant advisers have delegated the lion's share of their advisory responsibilities to one or more subadvisers, and that the portions of the overall advisory fees being retained by the advisers are "excessive" in light of the services that the advisers actually provide.[29]

"Subadvisory" Lawsuits: The second category comprises lawsuits, sometimes referred to as "subadvisory" lawsuits, alleging that the fees received by the defendant advisers from their *proprietary* funds are "excessive" in light of the fees that the advisers are receiving for providing what are allegedly the same or similar services in their role as subadvisers to *non-proprietary* funds.[30]

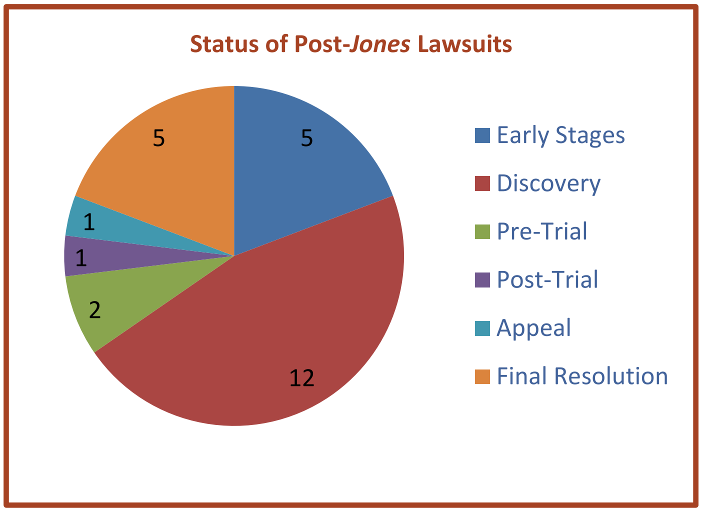


Other Section 36(b) Lawsuits: The third category comprises lawsuits that cannot readily be placed in either the "manager-of-managers" category or the "subadvisory" category. The lawsuits in this third category allege disparate theories of liability.[31]

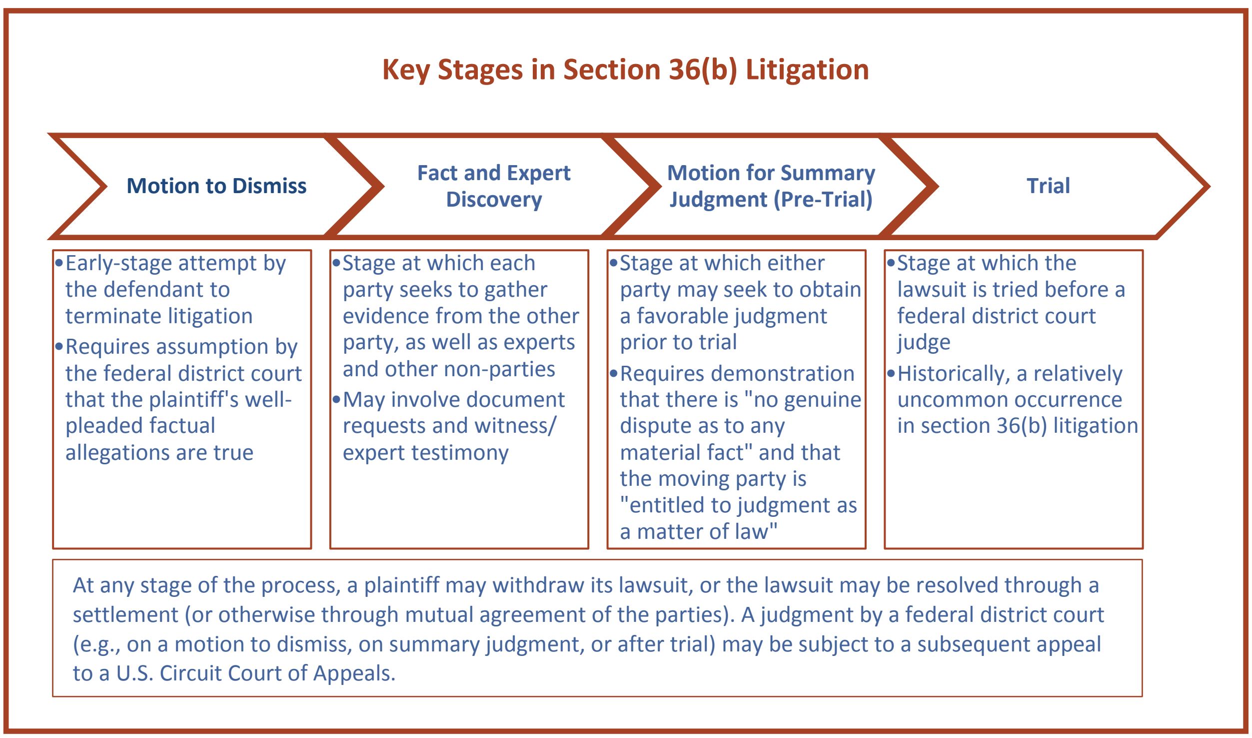
2. What Is the Current Status of the Post-*Jones* Section 36(b) Lawsuits?

As of June 30, 2016, the current status of the post-*Jones* lawsuits is as follows:

Early Stages: Five lawsuits remain in the early stages of the litigation process. In three of them, motions to dismiss (i.e., the preliminary legal challenges often mounted by defendant advisers in an effort to terminate lawsuits at an early stage of the litigation process) have been filed by the defendants and remain pending before the courts.[32] In a fourth lawsuit, the court recently granted the defendant adviser's motion to dismiss, but granted the plaintiffs leave to re-file their complaint.[33] In the remaining lawsuit, a motion to dismiss has not yet been filed.[34]



Middle Stage (Discovery): Twelve lawsuits have survived (or, in some cases, skipped over) the motion to dismiss stage of the litigation process, and are now in or approaching "discovery"—i.e., the expensive and time-consuming



stage of the litigation process in which each party obtains evidence from the other party and from experts and other non-parties.[35]

Late Stages: Four lawsuits—each of which can be broadly characterized as a manager-of-managers lawsuit—have proceeded through and beyond discovery, and are now in the late stages of the litigation process. The first of these lawsuits (initiated in 2011) proceeded to trial in early 2016;[36] the court has not yet issued its decision. The second lawsuit (also initiated in 2011) recently survived the defendant advisers' pre-trial motion for summary judgment, thereby clearing the way for the lawsuit to proceed to trial; that trial, assuming it goes forward, could potentially be held in late 2016.[37] The third lawsuit (initiated in 2013) was terminated in favor of the defendant advisers on summary judgment in 2015 (on the grounds that the plaintiff lacked "standing" to bring the lawsuit); the plaintiff has since appealed the district court's decision to the Eighth Circuit.[38] In the fourth lawsuit, a motion for summary judgment was filed in late June 2016 and remains pending.[39]

Final Resolution: Five of the twenty-six post-*Jones* lawsuits have reached final resolutions. A manager-of-managers lawsuit was dismissed, in relevant part, by a district court on "standing" grounds in 2011; the Third Circuit affirmed the dismissal in 2012.[40] Another manager-of-managers lawsuit was resolved by the parties in 2011.[41] A subadvisory lawsuit (initiated in late 2015) was resolved by mutual agreement of the parties within a few months of being filed.[42] The remaining two lawsuits to have reached final resolutions fall within the "other" category. One was resolved by the parties in 2012, and the second—the only post-*Jones* lawsuit to date to challenge securities lending revenue—was dismissed by a federal district court in 2014, with the dismissal subsequently affirmed by the Sixth Circuit (in 2014).[43]

3. Why Has the Plaintiffs' Bar Continued to Pursue Section 36(b) Litigation, Notwithstanding the Supreme Court's Decision in *Jones v. Harris*?

Since 1970, the plaintiffs' bar has developed and employed an evolving series of legal theories in an effort to demonstrate that challenged fees are "excessive" in violation of section 36(b). Over the years, a number of these theories have been rejected by the courts or otherwise discredited. In 2010, as discussed above, the Supreme Court in *Jones* adopted the *Gartenberg* standard as the law of the land. Given the high bar for liability inherent in the *Gartenberg* standard, plaintiffs' lawyers will almost certainly continue to face substantial hurdles to success on the merits in post-*Jones* section 36(b) litigation. What, then, has motivated them to continue to invest significant time, money and resources in pursuing this legal avenue?

Despite the long odds, some lawyers in the plaintiffs' bar may entertain hopes of winning a judgment on the merits in a section 36(b) lawsuit. But perhaps a more reasonable and rational answer is this—in a post-*Jones* landscape, the plaintiffs' bar has continued to invest in section 36(b) litigation not so much in hopes of eventually securing favorable judgments from courts, but rather in hopes of eventually securing remunerative (and non-public) settlements from defendant advisers. (See discussions below at "Inherent Risks of Going to Trial" and "Private (Non-Public) Settlements.")

4. What Features of Section 36(b) Litigation Have Likely Encouraged the Plaintiffs' Bar to Pursue These Lawsuits?

The following features of section 36(b) litigation have likely encouraged the plaintiffs' bar to continue to pursue these lawsuits:

Fewer "Barriers to Entry": From a purely procedural perspective, there are really only two significant "barriers to entry" for plaintiffs' lawyers in section 36(b) litigation—i.e., (1) finding a qualifying fund shareholder who is willing to serve as a "named plaintiff" in the lawsuit;[44] and (2) crafting a complaint whose factual allegations are sufficiently "plausible" to survive a defendant adviser's motion to dismiss (see discussion below at "Challenges Faced by Advisers in Obtaining Early Dismissals").[45] Under relevant federal court rules, section 36(b) lawsuits are neither securities fraud class actions (i.e., "rule 10b-5" class actions) nor traditional derivative lawsuits. As a result, the procedural barriers that play an important role in screening out non-meritorious complaints in those two types of shareholder lawsuits at an early stage of the litigation process—i.e., the "heightened pleading standard for securities fraud" requirement in rule 10b-5 class actions, and the "demand requirement" in traditional derivative lawsuits—are absent in section 36(b) litigation.[46]

Challenges Faced by Advisers in Obtaining Early Dismissals: Over the past decade, the U.S. Supreme Court has raised the bar for what a plaintiff must include in a federal court complaint in order to withstand a defendant's early-stage motion to dismiss. In a section 36(b) lawsuit, as in other federal court lawsuits, a plaintiff's complaint must now allege "enough factual matter" to make the plaintiff's claim "plausible on its face."[47] And some courts have suggested that claims under the ICA generally, including under section 36(b), "are particularly appropriate for dismissal…" at this stage.[48] But each complaint is assessed on its own merits, and federal district court judges enjoy considerable discretion in evaluating "plausibility."[49]

To date, defendant advisers have had limited success in securing such early-stage dismissals in post-*Jones* section 36(b) lawsuits.[50] (See box.) And even when motions to dismiss are granted, a court may permit a plaintiff to amend and refile his or her section 36(b) complaint (and thereby to obtain a "second bite at the apple").[51]

Motions to Dismiss in Post-*Jones* Lawsuits

Defendant advisers have opted to file motions to dismiss in most of the post-*Jones* section 36(b) lawsuits, but in only two instances have the defendant advisers ultimately been successful in having these motions granted in their entirety, so as to definitively terminate the lawsuits (i.e., with prejudice). (A court has recently granted the defendant adviser's motion to dismiss in a third lawsuit, but has granted the plaintiffs leave to re-file their complaint.) In fifteen of the post-*Jones* lawsuits, motions to dismiss have either been denied, or granted only in part. In four more, motions to dismiss either remain pending, or have yet to be filed.

Disproportionate Litigation Costs: For various reasons, section 36(b) lawsuits tend to be more expensive for advisers to defend than for plaintiffs' lawyers to prosecute. (Some defense counsel have informally estimated that litigation costs in section 36(b) lawsuits may range from three to four times higher for advisers than for plaintiffs.) This is particularly evident where, as in recent lawsuits in the subadvisory category, a small number of plaintiffs' law firms pursue a strategy of filing multiple, substantially similar section 36(b) lawsuits against multiple advisers.[52] Through such a strategy, the plaintiffs' law firms can develop "templates" for use (and re-use) at various stages of the litigation process, and thereby achieve what might be characterized as their own "economies of scale." By managing their own litigation costs, these plaintiffs' firms increase the chances that any attorneys' fees recoveries that they may receive in eventual settlements will prove profitable for them.

Advisers' Mixed Results in Obtaining Summary Judgments: Years into the litigation process, and after the conclusion (and expense) of fact and expert discovery, defendant advisers in section 36(b) lawsuits may seek to persuade judges to grant pre-trial "summary" judgments. In order to prevail at this stage, a defendant adviser must demonstrate that there is "no genuine dispute as to any material fact" and that the adviser is "entitled to judgment as a matter of law."

At present, it is premature to assess the impact of the Supreme Court's decision in *Jones* on defendant advisers' prospects for obtaining summary judgments:

- On the one hand, the Supreme Court's opinion in *Jones* did not foreclose defendant advisers from securing summary judgments in appropriate cases in section 36(b) litigation.[53] There have also been positive developments since *Jones* at the federal appellate court level with regard to summary judgments granted in two pre-*Jones* section 36(b) lawsuits. More specifically, the Seventh Circuit in 2015 affirmed a summary judgment that was originally granted by the district court to the defendant adviser in *Jones* itself (see discussion at Question B.3 above). The Seventh Circuit's decision followed a 2012 decision by another federal appellate court affirming a summary judgment that had been granted to a defendant adviser in a similar section 36(b) lawsuit—i.e., a lawsuit that, like *Jones*, focused on alleged disparities between fees charged to registered funds and fees charged to institutional accounts, and that, like *Jones,* was initiated long before the Supreme Court's 2010 decision.[54]

- On the other hand, the fund industry has had a mixed record in the three post-*Jones* section 36(b) lawsuits in which summary judgment rulings have been issued to date. In two of these lawsuits, the district courts denied the advisers' motions for summary judgment (in whole or in part), essentially on the grounds that there remained sufficient factual disputes between the parties over various *Gartenberg* factors to warrant a trial (although the court in one of these lawsuits did determine that the independent directors' approval of the advisory fees would be entitled to "substantial weight").[55] In the third lawsuit, the court granted summary judgment to the defendant adviser on the basis that the plaintiff lacked "standing" to pursue the lawsuit.[56]

Inherent Risks of Going to Trial: Both inside and outside the fund industry, major securities class action lawsuits that survive past summary judgment usually settle, sooner or later, by agreement of the parties, such that very few go to trial.[57] Similarly, trials of section 36(b) lawsuits have historically been relatively uncommon. The post-*Jones* lawsuit that proceeded to trial in early 2016 (see discussion at Question C.2 above) represents the first section 36(b) lawsuit to proceed to trial since 2009. (That 2009 lawsuit, in turn, represented the first section 36(b) lawsuit to proceed to trial since 1990.[58])

It is not yet clear, but trials of section 36(b) lawsuits may remain uncommon for the same general reasons that trials for securities class action lawsuits remain uncommon—i.e., both plaintiffs and defendants in these lawsuits have incentives and risks that generally cause them to prefer negotiated resolutions over trials.[59]

Private (Non-Public) Settlements: Unlike settlements in other categories of major securities litigation (e.g., "rule 10b-5" class actions, "prospectus liability" class actions), settlements of section 36(b) lawsuits tend to be non-public, and tend to be effected without judicial review. Indeed, the public paperwork filed with the court in a section 36(b) settlement need not even disclose whether the plaintiff received a settlement.[60] The non-public nature of section 36(b) settlements arguably reduces the potential for reputational damage on the part of settling advisers and otherwise facilitates the settlement process, which may, in turn, serve to encourage plaintiffs' lawyers to pursue this type of litigation.

5. Why Might the Next Twelve to Eighteen Months Be a Particularly Important Period for Section 36(b) Litigation?

The fund industry is entering what may prove to be a particularly important period for section 36(b) litigation. The fund industry's past and current experience in this type of litigation suggests that where section 36(b) lawsuits survive (or skip over) early-stage motions to dismiss (as has thus far largely been the case for the post-*Jones* lawsuits), the defendant advisers will face a prolonged and burdensome litigation process in which the advisers are likely to incur many millions of dollars in legal and expert defense fees and costs. The independent directors of the funds at issue will also incur legal expenses (which are typically indemnifiable) as non-party witnesses in these lawsuits. (See discussion in the box below.)

Observations on Section 36(b) for Fund Independent Directors

Section 36(b) lawsuits are typically brought against investment advisers (and, in some instances, distributors or other affiliated service providers). In modern section 36(b) litigation, plaintiffs have rarely sought to name fund independent directors as defendants (although plaintiffs have sometimes sought to include funds themselves as "nominal" defendants).[61] Nonetheless, the scrutiny of independent directors and the board's section 15(c) process in these cases is intense. The "independence, expertise, care, and conscientiousness of the board in evaluating adviser compensation" has long been an important factor in the *Gartenberg* analysis; in *Jones v. Harris*, the Supreme Court underscored the critical role played by the board's process in adjudicating a section 36(b) challenge, stating that "[w]here a board's process for negotiating and reviewing investment-adviser compensation is robust, a reviewing court should afford commensurate deference to the outcome of the bargaining process."[62]

As a practical matter, there may be little that fund independent directors—particularly those serving on fund boards in large fund groups—can do to eliminate the risk that their funds' advisers will be targeted by the plaintiffs' bar in section 36(b) litigation. Independent directors should recognize that they could be called as non-party witnesses in the event of such litigation, and that their past actions as directors are likely to be closely scrutinized over the course of the litigation process. A continued focus by independent directors on three fundamental principles—preparation, process, and documentation—can assist directors in managing "front-end" risk in section 36(b) litigation, so as to increase the likelihood that such litigation, if brought, will be resolved in a manner that reflects favorably on the care and attention that independent directors devote to the section 15(c) process. ICI Mutual's publication, *Independent Director Litigation Risk: A Practical Guide to Understanding and Reducing Risk to Fund Independent Directors in Civil Litigation*, provides an expanded discussion of these principles and of various litigation risk management techniques.

All litigation is expensive, and section 36(b) litigation is especially so. It is not uncommon for advisers to incur many millions of dollars in costs—in the form of legal fees and expert witness expenses—in defending against section 36(b) lawsuits, and legal fees incurred by fund independent directors as non-party witnesses can likewise be significant. Although independent directors can typically expect that they will be indemnified by their funds against such legal costs, they may wish to confirm this point with fund counsel. Independent directors may also wish to review the terms of their funds' directors and officers/errors and omissions (D&O/E&O) liability insurance policies (and independent directors liability (IDL) insurance policies) in order to confirm that their policies will cover their legal costs as non-party witnesses in such cases.

At some point over the next twelve to eighteen months—and very possibly, before year-end 2016—it seems probable that a federal district court judge will issue a judgment on the merits in the first of the post-*Jones* lawsuits to have proceeded through trial. It could also be that during this time, a second post-*Jones* lawsuit, having recently moved past the adviser's motion for summary judgment, will proceed to trial, and a decision on a pending motion for summary judgment in a third lawsuit may be issued. Meanwhile, over this same twelve-to-eighteen month period, other post-*Jones* lawsuits are likely to reach the later stages of the litigation process, such that defendant advisers may be faced with a difficult decision between (1) pursuing a judgment on the merits (i.e., in the form of a summary judgment and/or following trial), with the attendant risks that this option entails, or (2) entering into a non-public settlement that will provide the settling adviser with no legal guarantee against being subject to future section 36(b) litigation as to other, or even the same, funds.

Any judgments that may be issued by federal district courts in favor of fund advisers during this period—whether in the form of summary judgments or of judgments that follow trials—are likely to be appealed by plaintiffs' counsel to the federal appellate courts. As a result, final resolutions of such cases may not be achieved for a number of years. Even so, as both a practical and a jurisprudential matter, upcoming developments at the federal district court level in certain of the post-*Jones* section 36(b) lawsuits—i.e., in those that are now in, or poised to enter, the later stages of the litigation process—could have important implications for the fund industry. In particular, these developments may influence (1) how litigants and courts address and resolve those post-*Jones* lawsuits that currently remain in the earlier stages of the litigation process, and (2) whether, and to what extent, the plaintiffs' bar continues to initiate similar section 36(b) lawsuits against other fund advisers.

Appendix

List of Section 36(b) Lawsuits Initiated Since *Jones v. Harris*
(Status as of June 30, 2016)

(Cases in **blue** were active as of June 30, 2016)

Year	Case Name*	Type**	Status
2010	• **Santomenno v. John Hancock Life Ins. Co.**, No. 10-cv-1655 (D.N.J. filed Mar. 31, 2010), *dismissed*, 2011 U.S. Dist. LEXIS 55317 (D.N.J. May 23, 2011) (as to section 36(b)) & 2013 U.S. Dist. LEXIS 103404 (D.N.J. July 24, 2013) (as to ERISA)), *aff'd*, 677 F.3d 178 (3d Cir. 2012) & 2014 U.S. App. LEXIS 18437 (3d Cir. Sept. 26, 2014), *reh'g denied*, No. 13-3467 (3d Cir. Nov. 24, 2014), *cert. denied*, (U.S. Apr. 20, 2015) (No. 14-1054)	MoM	Closed
	• **Southworth v. Hartford Inv. Fin. Serv., LLC**, No. 10-cv-878 (D. Del. filed Oct. 14, 2010), *closed per stipulation* (Nov. 7, 2011)	MoM	Closed
2011	• **Kasilag v. Hartford Inv. Fin. Serv., LLC**, No. 11-cv-1083 (D.N.J. filed Feb. 25, 2011)	MoM	Pre-Trial
	• **Reso v. Artisan Partners Ltd. P'ship**, No. 11-cv-873 (E.D. Wis. filed Sept. 16, 2011), *closed per stipulation* (Aug. 23, 2012)	Other	Closed
	• **Sivolella v. AXA Equitable Life Ins. Co.**, No. 11-cv-4194 (D.N.J. filed July 21, 2011)	MoM	Post-Trial
2013	• **Laborer's Local 265 Pension Fund v. iShares Trust**, No. 13-cv-46 (M.D. Tenn. filed Jan. 18, 2013), *dismissed*, 2013 U.S. Dist. LEXIS 122613 (M.D. Tenn. Aug. 28, 2013), *aff'd*, 2014 U.S. App. LEXIS 18627 (6th Cir. Sept. 30, 2014), *cert. denied*, (U.S. Mar. 2, 2015) (No. 14-771)	Other	Closed
	• **Am. Chem. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp.**, No. 13-cv-1601 (N.D. Ala. filed Aug. 28, 2013), *dismissed*, No. 14-cv-44 (S.D. Iowa Feb. 3, 2016), *appeal docketed*, No. 16-1580 (8th Cir. filed Mar. 8, 2016)	MoM	On appeal
	• **In re Voya Global Real Estate Fund S'holder Litig.**, No. 13-cv-1521 (D. Del. filed Aug. 30, 2013)	MoM	Discovery
	• **In re Russell Inv. Co. S'holder Litig.**, No. 13-cv-12631 (D. Mass. filed Oct. 17, 2013)	MoM	Pre-Trial
	• **Curd v. SEI Invs. Mgmt. Corp.**, No. 13-cv-7219 (E.D. Pa. filed Dec. 11, 2013)	MoM	Discovery
2014	• **Zehrer v. Harbor Capital Advisors, Inc.**, No. 14-cv-789 (N.D. Ill. filed Feb. 4, 2014)	MoM	Discovery
	• **In re BlackRock Mut. Funds Advisory Fee Litig.**, No. 14-cv-1165 (D.N.J. filed Feb. 21, 2014)	SA	Discovery
	• **Goodman v. J.P. Morgan Inv. Mgmt., Inc.**, No. 14-cv-414 (S.D. Ohio filed May 5, 2014)	SA	Discovery
	• **Kennis v. First Eagle Inv. Mgmt., LLC**, No. 14-cv-585 (D. Del. filed May 7, 2014)	SA	Discovery
	• **In re Davis N.Y. Venture Fund Fee Litig.**, No. 14-cv-4318 (S.D.N.Y. filed Jun. 16, 2014)	SA	Discovery
	• **Redus-Tarchis v. N.Y. Life Inv. Mgmt.**, No. 14-cv-7991 (D.N.J. filed Dec. 23, 2014)	MoM	Discovery
	• **Kenny v. Pac. Inv. Mgmt. Co. LLC**, No. 14-cv-1987 (W.D. Wash. filed Dec. 31, 2014)	Other	Discovery
2015	• **Chill v. Calamos Advisors, LLC**, No. 15-cv-1014 (S.D.N.Y. filed Feb. 11, 2015)	SA	Discovery
	• **Ingenhutt v. State Farm Inv. Mgmt. Corp.**, No. 15-cv-1303 (C.D. Ill. filed July 22, 2015)	MoM	Motion to Dismiss†
	• **Wayne County Employees' Ret. System v. Fiduciary Mgmt. Inc.**, No. 15-cv-1170 (E.D. Wis. filed Sept. 30, 2015), *closed per stipulation* (Jan. 4, 2016)	SA	Closed
	• **Kennis v. Metro. West Asset Mgmt., LLC**, No. 15-cv-8162 (C.D. Cal. filed Oct. 16, 2015)	SA	Discovery
	• **North Valley GI Med. Group v. Prudential Invs. LLC**, No. 15-cv-3268 (D. Md. filed Oct. 30, 2015)	MoM	Motion to Dismiss
	• **Ventura v. Principal Mgmt. Corp.**, No. 15-cv-481 (S.D. Iowa filed Dec. 30, 2015)	MoM	Discovery
2016	• **Obeslo v. Great-West Capital Mgmt., LLC**, No. 16-cv-230 (D. Colo. filed Jan. 29, 2016)	MoM	Motion to Dismiss
	• **Paskowitz v. Prospect Capital Mgmt., L.P.**, No. 16-cv-2990 (S.D.N.Y. filed Apr. 21, 2016)	Other	Motion to Dismiss
	• **Zoidis v. T. Rowe Price Assocs., Inc.**, No. 16-cv-2289 (N.D. Cal. filed Apr. 27, 2016)	SA	Pre-Motion to Dismiss

***** The list above does not include cases that were or are likely to be consolidated into other cases.

****** As discussed in Question C.1 above, the post-*Jones* lawsuits may be broadly categorized as **MoM** (manager-of-managers lawsuits), **SA** (subadvisory lawsuits), or **Other** (lawsuits that cannot readily be placed in either the "manager-of-managers" category or the "subadvisory" category). Some of the lawsuits may advance more than one theory of liability.

† On June 22, 2016, the district court granted the defendant adviser's motion to dismiss the plaintiffs' first amended complaint in this lawsuit, but provided the plaintiffs with fourteen days to file a second amended complaint.

Endnotes

1 Jones v. Harris Assocs. L.P., 559 U.S. 335, 348 (2010).

2 Pub. L. 91-547, 84 Stat. 4184, § 8, Dec. 14, 1970 (codified as amended at 15 U.S.C. § 80a-15).

3 Pub. L. 91-547, 84 Stat. 4184, § 20, Dec. 14, 1970 (codified as amended at 15 U.S.C. § 80a-35). Section 36(b) also provides fund shareholders (as well as the U.S. Securities and Exchange Commission) with the right to bring such lawsuits against certain other designated "persons," including "affiliated persons" of the fund's investment adviser, but specifies (at Section 36(b)(3)) that "[n]o … [such lawsuits] shall be brought or maintained against any person *other than the recipient* of [the challenged] compensation or payments…."

4 *See Jones*, 559 U.S. at 339. *See also* Daily Income Fund v. Fox, 464 U.S. 523, 540 (1984) (stating that "Congress decided not to rely solely on the fund's directors to assure reasonable adviser fees, notwithstanding the increased disinterestedness of the board…. This policy choice strongly indicates that Congress intended security holder and SEC actions under § 36(b), on the one hand, and directorial approval of adviser contracts, on the other, to act as independent checks on excessive fees.").

5 *Jones*, 559 U.S. at 348.

6 *See* Lori Martin, PRACTICING L. INST., *Litigation Under the Investment Company Act of 1940,* in 2 MUTUAL FUND REG., Ch. 26, 8 (Clifford E. Kirsch, ed., 2011); *see also* Amy B. R. Lancellotta, Paulita A. Pike, & Paul Schott Stevens, *Fund Governance: A Successful, Evolving Model*, 10 VA. L. & BUS. REV. 455, 467 (2016) (observing that "[t]he final amendments [to section 36(b)], after much back and forth, shifted the standard from 'reasonableness' to one of 'fiduciary duty' imposed on an investment adviser (or an affiliate)"); *Jones*, 559 U.S. at 340 ("The 'fiduciary duty' standard contained in § 36(b) represented a delicate compromise…. The provision … adopted 'a different method of testing management compensation,' … that was more favorable to shareholders than the previously available remedies but that did not permit a compensation agreement to be reviewed in court for 'reasonableness.'").

7 Section 36(b), by its terms, does recognize that courts may consider the fact that a fund board has approved challenged fees (or that fund shareholders have approved or ratified challenged fees), but the section states only that such approval (or ratification) "shall be given such consideration by the court as is deemed appropriate under all the circumstances."

8 *See* Martin, *supra* note 6, at 9, *citing* Fogel v. Chestnutt, 668 F.2d 100, 112 (2d Cir. 1981) (Friendly, J.) (citation omitted) ("studied ambiguity"); Gartenberg v. Merrill Lynch Asset Mgmt., Inc., 694 F.2d 923, 928 (2d Cir. 1982) ("tortuous"). *See also* Jones v. Harris Assocs. L.P., 527 F.3d 627, 633 (7th Cir. 2008) ("Plaintiffs ask us to look beyond the statute's text [i.e., the text of section 36(b)] to its legislative history, but that history … is like many legislative histories in containing expressions that seem to support every possible position. Some members of Congress equated fiduciary duty with review for reasonableness; others did not (language that would have authorized review of rates for reasonableness was voted down); the Senate committee report disclaimed any link between fiduciary duty and reasonableness of fees.").

9 Gartenberg v. Merrill Lynch Asset Mgmt., Inc., 694 F.2d 923, 928 (2d Cir. 1982).

10 *Id.* at 928-32.

11 *Jones*, 559 U.S. at 343.

12 These lawsuits are sometimes referred to as "pure" section 36(b) lawsuits, in order to distinguish them from a second broad category of fee-based lawsuits filed during that same period. Lawsuits in the second category, sometimes referred to as "hybrid" lawsuits, originally challenged both excessive fees and certain distribution-related practices. *See generally* ICI MUTUAL INSURANCE COMPANY, INVESTMENT MANAGEMENT LITIGATION NOTEBOOK 28-33, 62-64 (vol. V 2007) (providing examples of "hybrid" and "pure" cases).

13 Jones v. Harris Assocs. L.P., 2007 U.S. Dist. LEXIS 13352, at *23.

[14] While on opposite sides of the debate in *Jones*, the two Seventh Circuit judges—Judges Frank Easterbrook and Richard Posner, both associated with the "law and economics" school of legal jurisprudence—have "[f]or decades … collaborated famously on a likeminded exposition of the economic analysis of law in their roles both as brethren on the Seventh Circuit and as fellow faculty members at the University of Chicago Law School." William A. Birdthistle, *Investment Indiscipline: A Behavioral Approach to Mutual Fund Jurisprudence,* 2010 U. ILL. L. REV. 61, 63 (2010). *See generally* Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance,* 78 S. CAL. L. REV. 23, 44-50 (2004) (presenting data ranking Easterbrook and Posner as the top two publishers and cited authors of appellate court opinions published during the 1998-2000 period).

[15] *Jones*, 527 F.3d at 632. For a summary of the history of *Jones v. Harris,* including discussion of developments at the Seventh Circuit, see "Background on Jones v. Harris Associates L.P." (Investment Company Institute), http://www.ici.org/jvh_resources/background/09_jvh_bkgrd.

[16] In this regard, Easterbrook wrote:

> Harris Associates charges a lower percentage of assets to other clients, but this does not imply that it must be charging too much to the Oakmark funds. Different clients call for different commitments of time. Pension funds have low (and predictable) turnover of assets. Mutual funds may grow or shrink quickly and must hold some assets in high-liquidity instruments to facilitate redemptions. That complicates an adviser's task. Joint costs likewise make it hard to draw inferences from fee levels. Some tasks in research, valuation, and portfolio design will have benefits for several clients. In competition those joint costs are apportioned among paying customers according to their elasticity of demand, not according to any rule of equal treatment.

Jones, 527 F.3d at 634-35.

[17] Additional information on the history of the *Jones v. Harris* lawsuit may be found on the Investment Company Institute's *Jones v. Harris* Resource Center, https://www.ici.org/jvh, which provides links to news releases, contemporaneous commentary, court briefs, research on fees and competition in the mutual fund industry, and other information.

[18] *Jones*, 559 U.S. at 346.

[19] *See, e.g.,* Quinn Curtis and John Morley, *The Flawed Mechanics of Mutual Fund Fee Litigation,* 120 YALE J. ON REG. 1, 5 (Winter 2015) ("In the end, the Supreme Court upheld the status quo and maintained excessive fee liability…."); Nathan Greene and Jesse Kanach, *Jones v. Harris Associates L.P.—Mutual Fund Fees and the Supreme Court: What Next?,* SEC. REG. & L. REP., 2 (May 3, 2010) ("The Supreme Court's Jones v. Harris decision could have rocked the fund industry. Instead, it was plainly a victory for the status quo.").

[20] *Jones*, 559 U.S. at 353.

[21] Jones v. Harris Assocs. L.P., 611 Fed. Appx. 359 (7th Cir. Aug. 6, 2015). In its opinion, the Seventh Circuit apologized for the delay, explaining, "The court's internal system for tracking cases under advisement does not include remands from the Supreme Court, so the normal process of alerts and ticklers failed. We will see to it that this is fixed. That may be small comfort to these litigants and their lawyers, but at least some good will come from the delay."

[22] *Id.* at 360.

[23] *Id.* at 360-61.

[24] Jones v. Harris Assocs. L.P., No. 07-1624 (7th Cir. Oct. 13, 2015) (order denying plaintiffs' petition for rehearing and rehearing *en banc*).

[25] *See* Greene and Kanach, *supra* note 19, at 4.

[26] Because the Supreme Court endorsed the demanding *Gartenberg* standard, some characterized the Court's decision as industry-friendly. But because the Court rejected the Seventh Circuit's stricter test—and arguably

even liberalized the *Gartenberg*-based framework in certain respects—others characterized the decision as modestly investor-friendly. And given the Court's refusal to address the underlying "market forces/competition" question, there were still others who viewed the Court as having simply ducked a central and important issue in an ongoing debate over industry fee levels. *Compare, e.g.,* Asher Hawkins, *Investor-Friendly Supreme Court Ruling in Mutual Fund Fee Case*, FORBES, Mar. 30, 2010, http://www.forbes.com/sites/moneybuilder/2010/03/30/investor-friendly-supreme-court-ruling-in-mutual-fund-fee-case/ ("The justices held today that the Chicago court was wrong to disregard Gartenberg, and are ordering appellate judges there to reconsider their earlier decision accordingly. For fund investors, that counts as a win."); *and* James Vicini, *Supreme Court hands victory to mutual fund industry*, REUTERS, Mar. 30, 2010, http://www.reuters.com/article/2010/03/30/us-mutualfunds-court-idUSTRE62T2UT20100330 ("The Supreme Court handed a victory to the $11 trillion mutual fund industry by endorsing a 1982 legal standard to decide the fairness of fund fees, a ruling that gives companies considerable freedom to set investment adviser charges."); *with* Floyd Norris, *Supreme Court Punts*, N.Y. TIMES (Mar. 30, 2010), http://economix.blogs.nytimes.com/2010/03/30/supreme-court-punts/ ("It will be quite a while before lower court judges decide who really won this case. Justice Alito lists all the things that should be considered, with plenty of items to be seized upon by funds … and others to be cited by shareholders…. A judge could find support for any decision he or she wants to make."); *see generally* William Birdthistle, *Reactions, Victories & Predictions: Jones v. Harris*, THE CONGLOMERATE (Apr. 1, 2010), http://www.theconglomerate.org/2010/04/reactions-victories-predictions-jones-v-harris.html (citing the foregoing articles, along with "representative law professor posts").

27 Before 2010 was over, several legal scholars had published articles analyzing and critiquing the Supreme Court's decision and advancing differing views as its future implications. *See, e.g.*, John C. Coates, IV, *The Downside of Judicial Restraint: The (Non-)Effect of Jones v. Harris*, 6 DUKE J. OF CONS. L. & PUB. POL'Y 58, 59 (2010); Larry E. Ribstein, *Federal Misgovernance of Mutual Funds*, 2009-10 CATO SUP. CT. REV. 301 (2010). In the years since, academics have continued to explore the implications of the Supreme Court's decision and to offer commentaries on section 36(b). In addition to articles referenced elsewhere in these endnotes, *see, e,g.*, Kathryn Judge, *Fee Effects*, 98 IOWA L. REV. 1517 (May 1, 2013); William A. Birdthistle, *The Supreme Court's Theory of the Fund*, 37 IOWA J. CORP. L. 771 (Jan. 1, 2012); M. Todd Henderson, *Justifying Jones*, 77 U. CHI. L. REV. 1027 (Jan. 1, 2010); H. Norman Knickle, *The Mutual Fund's Section 15(c) Process: Jones v. Harris, The SEC and Fiduciary Duties of Directors*, 31 REV. BANKING & FIN. L. 265 (Jan. 1, 2011); George Steven Swan, *The Law and Economics of Mutual Fund Investment-Adviser Fiduciaries: Jones v. Harris Associates L.P.*, 35 NOVA L. REV. 393 (Jan. 1, 2011).

28 The count of post-*Jones* lawsuits set forth in this publication does not include cases that were or are likely to be consolidated into other cases.

29 *See* Obeslo v. Great-West Capital Mgmt., LLC, No. 16-cv-230 (D. Colo. filed Jan. 29, 2016); Ventura v. Principal Mgmt. Corp., No. 15-cv-481 (S.D. Iowa filed Dec. 30, 2015); North Valley GI Med. Group v. Prudential Invs. LLC, No. 15-cv-3268 (D. Md. filed Oct. 16, 2015); Ingenhutt v. State Farm Inv. Mgmt. Corp., No. 15-cv-1303 (C.D. Ill. filed July 22, 2015); Redus-Tarchis v. N.Y. Life Inv. Mgmt., No. 14-cv-7991 (D.N.J. filed Dec. 23, 2014); Zehrer v. Harbor Capital Advisors, Inc., No. 14-cv-789 (N.D. Ill. filed Feb. 4, 2014); Curd v. SEI Invs. Mgmt. Corp., No. 13-cv-7219 (E.D. Pa. filed Dec. 11, 2013); In re Russell Inv. Co. S'holder Litig., No. 13-cv-12631 (D. Mass. filed Oct. 17, 2013); In re Voya Global Real Estate Fund S'holder Litig., No. 13-cv-1521 (D. Del. filed Aug. 30, 2013); Am. Chems. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp., No. 14-cv-44 (N.D. Ala. filed Aug. 28, 2013); Sivolella v. AXA Equitable Life Ins. Co., No. 11-cv-4194 (D.N.J. filed July 21, 2011); Kasilag v. Hartford Inv. Fin. Serv., LLC, No. 11-cv-1083 (D.N.J. filed Feb. 25, 2011); Southworth v. Hartford Inv. Fin. Serv., LLC, No. 10-cv-878 (D. Del. filed Oct. 14, 2010); Santomenno v. John Hancock Life Ins. Co., No. 10-cv-1655 (D.N.J. filed Mar. 31, 2010).

30 *See* Zoidis v. T. Rowe Price Assocs., Inc., No. 16-cv-2289 (N.D. Cal. filed Apr. 27, 2016); Kennis v. Metro. West Asset Mgmt., LLC, No. 15-cv-8162 (C.D. Cal. filed Oct. 16, 2015); Wayne County Employees' Ret. System v. Fiduciary Mgmt. Inc., No. 15-cv-1170 (E.D. Wis. filed Sept. 30, 2015); Chill v. Calamos Advisors, LLC, No. 15-cv-1014 (S.D.N.Y. filed Feb. 11, 2015); In re Davis N.Y. Venture Fund Fee Litig., No. 14-cv-4318 (S.D.N.Y. filed Jun. 16, 2014); Kennis v. First Eagle Inv. Mgmt., LLC, No. 14-cv-585 (D. Del. filed May

7, 2014); Goodman v. J.P. Morgan Inv. Mgmt., Inc., No. 14-cv-414 (S.D. Ohio filed May 5, 2014); In re BlackRock Mut. Funds Advisory Fee Litig., No. 14-cv-1165 (D.N.J. filed Feb. 21, 2014).

31 *See* Paskowitz v. Prospect Capital Mgmt., L.P., No. 16-cv-2990 (S.D.N.Y. filed Apr. 21, 2016) (alleging that the adviser's fees charged to a business development company ("BDC") are higher than those charged by advisers to similarly managed BDCs); Kenny v. Pac. Inv. Mgmt. Co. LLC, No. 14-cv-1987 (W.D. Wash. filed Dec. 21, 2014) (alleging, among other things, that the adviser's fees charged to the affiliated fund are higher than those charged to its similarly managed exchange-traded fund ("ETF")); Laborer's Local 265 Pension Fund v. iShares Trust, No. 13-cv-46 (M.D. Tenn. filed Jan. 18, 2013) (challenging the "split" between securities lending revenue paid to an ETF's adviser and its affiliate (which provided the securities lending services)); Reso v. Artisan Partners Ltd. P'ship, No. 11-cv-873 (E.D. Wis. filed Sept. 16, 2011) (alleging, among other things, that the adviser's fees charged to the affiliated funds are higher than those charged by the adviser to its institutional clients).

32 *See* Paskowitz v. Prospect Capital Mgmt., L.P., No. 16-cv-2990 (S.D.N.Y. filed Apr. 21, 2016) (motion to dismiss filed on June 30, 2016); Obeslo v. Great-West Capital Mgmt., LLC, No. 16-cv-230 (D. Colo. filed Jan. 29, 2016) (motion to dismiss filed on May 2, 2016); North Valley GI Med. Group v. Prudential Invs. LLC, No. 15-cv-3268 (D. Md. filed Oct. 16, 2015) (motion to dismiss filed on Jan. 29, 2016).

33 *See* Ingenhutt v. State Farm Inv. Mgmt. Corp., No. 15-cv-1303 (C.D. Ill. June 22, 2016) (order granting motion to dismiss, but giving plaintiffs leave to re-file).

34 *See* Zoidis v. T. Rowe Price Assocs., Inc., No. 16-cv-2289 (N.D. Cal. filed Apr. 27, 2016).

35 *See* Kennis v. Metro. West Asset Mgmt., LLC, No. 15-cv-8162 (C.D. Cal. June 16, 2016) (order denying motion to dismiss); Chill v. Calamos Advisors, LLC, No. 15-cv-1014, 2016 U.S. Dist. LEXIS 39954 (S.D.N.Y. Mar. 28, 2016) (order denying motion to dismiss); Kennis v. First Eagle Inv. Mgmt., LLC, No. 14-cv-585, 2015 U.S. Dist. LEXIS 167849 (D. Del. Dec. 8, 2015) (order denying motion to dismiss); In re Davis N.Y. Venture Fund Fee Litig., No. 14-cv-4318, 2015 U.S. Dist. LEXIS 155821 (S.D.N.Y. Nov. 18, 2015) (order denying motion to dismiss); Redus-Tarchis v. N.Y. Life Inv. Mgmt., No. 14-cv-7991, 2015 U.S. Dist. LEXIS 146007 (D.N.J. Oct. 28, 2015) (order denying motion to dismiss); Kenny v. Pac. Inv. Mgmt. Co. LLC, No. 14-cv-1987 (W.D. Wash. Aug. 26, 2015) (order denying motion to dismiss); Curd v. SEI Invs. Mgmt. Corp., No. 13-cv-7219, 2015 U.S. Dist. LEXIS 90940 (E.D. Pa. July 14, 2015) (order denying motion to dismiss); In re BlackRock Mut. Funds Advisory Fee Litig., No. 14-cv-1165, 2015 U.S. Dist. LEXIS 39514 (D.N.J. Mar. 27, 2015) (order denying motion to dismiss); Goodman v. J.P. Morgan Inv. Mgmt., Inc., No. 14-cv-414, 2015 U.S. Dist. LEXIS 26361 (S.D. Ohio Mar. 4, 2015) (order denying motion to dismiss); Zehrer v. Harbor Capital Advisors, Inc., No. 14-cv-789, 2014 U.S. Dist. LEXIS 162060 (N.D. Ill. Nov. 18, 2014) (order denying motion to dismiss).

In two other lawsuits, the defendants opted not to file motions to dismiss. Ventura v. Principal Mgmt. Corp., No. 15-cv-481 (S.D. Iowa filed Dec. 30, 2015); In re Voya Global Real Estate Fund S'holder Litig., No. 13-cv-1521 (D. Del. filed Aug. 30, 2013).

36 *See* Sivolella v. AXA Equitable Life Ins. Co., No. 11-cv-4194 (D.N.J. filed July 21, 2011). The last section 36(b) lawsuit to go to trial was In re Am. Mut. Funds Fee Litig., No. 04-cv-5593, 2009 U.S. Dist. LEXIS 120597 (C.D. Cal. Dec. 28, 2009), *aff'd sub nom*, Jelinek v. Capital Research & Mgmt. Co., 448 Fed. Appx. 716, 2011 U.S. App. LEXIS 17821 (9th Cir. 2011).

37 Kasilag v. Hartford Inv. Fin. Servs. LLC, No. 11-cv-1083, 2016 U.S. Dist. LEXIS 47063 (D.N.J. Mar. 24, 2016) (order granting in part and denying in part the defendants' motion for summary judgment and the plaintiffs' motion for partial summary judgment). In partially granting the defendants' motion for summary judgment, the court found that the independent directors' approval of the advisory fees is entitled to "substantial weight." *Id.* at *43-65.

38 Am. Chem. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp., No. 13-cv-1601 (N.D. Ala. Feb. 3, 2016) (order granting motion for summary judgment).

[39] In re Russell Inv. Co. S'holder Litig., No. 13-cv-12631 (D. Mass. June 24, 2016) (filing of motion for summary judgment).

[40] Santomenno v. John Hancock Life Ins. Co., 2011 U.S. Dist. LEXIS 55317 (D.N.J. May 23, 2011) (dismissed as to section 36(b) on standing grounds) & No. 10-cv-1655 (D.N.J. Aug. 24, 2013) (dismissed as to ERISA), *aff'd*, 677 F.3d 178 (3d Cir. 2012) (as to section 36(b)) & 768 F.3d 284 (3d Cir. 2014) (as to ERISA), *reh'g denied*, No. 13-3467 (3d Cir. Nov. 24, 2014), *petition for cert. filed*, (U.S. Feb. 19, 2015) (No. 14-1054), *cert. denied*, (U.S. Apr. 20, 2015) (No. 14-1054).

[41] Southworth v. Hartford Inv. Fin. Servs. LLC, No. 10-cv-878 (D. Del. filed Oct. 14, 2010) (voluntarily dismissed by the plaintiffs in November 2011).

[42] Wayne County Employees' Ret. Sys. v. Fiduciary Mgmt. Inc., No. 15-cv-1170 (E.D. Wis. Jan. 4, 2016) (order dismissing lawsuit with prejudice pursuant to a stipulation of the parties).

[43] Reso v. Artisan Partners Ltd. P'ship, No. 11-cv-873 (E.D. Wis. Aug. 23, 2012) (order dismissing lawsuit with prejudice pursuant to a stipulation of the parties); Laborers' Local 265 Pension Fund v. iShares Trust, No. 13-cv-46, 2013 U.S. Dist. LEXIS 122613 (M.D. Tenn. Aug. 28, 2013) (dismissal chiefly relying on the inapplicability of section 36(b) to compensation or payments made pursuant to an order under section 17 of the ICA, as the securities lending payments at issue were made in accordance with an SEC exemptive order), *aff'd*, 769 F.3d 399 (6th Cir. 2014), *cert. denied*, (U.S. Mar. 2, 2015) (No. 14-771).

[44] The failure to find such a qualifying shareholder can result in an early dismissal of a section 36(b) lawsuit. *See, e.g.*, Curran v. Principal Mgmt. Corp., LLC, No. 09-cv-433, 2011 U.S. Dist. LEXIS 6577 (S.D. Iowa Jan. 24, 2011) (shareholder in "fund of funds" did not qualify to bring section 36(b) lawsuit on behalf of underlying funds); Santomenno v. John Hancock Life Ins. Co. (U.S.A.), 677 F.3d 178, 182-85 (3d Cir. 2012) (a plaintiff lacks "standing" to sue under section 36(b) if he fails to own fund shares continuously during the pendency of the lawsuit).

[45] There are, of course, various considerations that may affect individual determinations by plaintiffs' lawyers as to whether to initiate and pursue *particular* section 36(b) lawsuits (e.g., the relative size of the fund(s) involved, the views of the plaintiffs' lawyers as to the likelihood that particular advisers may be willing to settle prior to trial). The discussion in the text relates not to such individual determinations, but rather to the overall *procedural* "barriers to entry" in section 36(b) litigation.

[46] *See generally* Curtis and Morley, *supra* note 19, at 26.

[47] *See generally* John S. Summers and Michael D. Gadarian, *Imagine the Plausibilities: Life after Twombly and Iqbal*, LITIG. 1 (Winter 2011).

[48] Krantz v. Prudential Invs. Fund Mgmt. LLC, 77 F. Supp. 2d 559, 562 (D.N.J. 1999) (order granting motion to dismiss), *aff'd*, 305 F.3d 140 (3d Cir. 2002).

[49] The potential "factors" for consideration set forth in *Gartenberg* (and cited in *Jones*) arguably add to the challenges faced by advisers in obtaining dismissals at this early stage. Among other things, some courts have indicated that plaintiffs need only provide "plausible" allegations on some (and not all) of the *Gartenberg* factors in order to withstand motions to dismiss. *See, e.g.*, Kennis v. First Eagle Inv. Mgmt., LLC, No. 14-cv-585, 2015 U.S. Dist. LEXIS 137442, at *11-12 (D. Del. Oct. 8, 2015) (magistrate's report and recommendations, later adopted by the district court in denying defendant's motion to dismiss, 2015 U.S. Dist. LEXIS 167849 (D. Del. Dec. 8, 2015)).

[50] In a limited number of post-*Jones* section 36(b) lawsuits, defendant advisers and their counsel, as a matter of litigation strategy, have determined to forgo early-stage motions to dismiss. *See* Ventura v. Principal Mgmt. Corp., No. 15-cv-481 (S.D. Iowa filed Dec. 30, 2015); In re Russell Inv. Co. S'holder Litig., No. 13-cv-12631 (D. Mass. filed Oct. 17, 2013); In re Voya Global Real Estate Fund S'holder Litig., No. 13-cv-1521 (D. Del. filed Aug. 30, 2013). More typically, however, and as discussed in the text, defendant advisers have filed such motions. Separate and apart from their potential to result in early-stage dismissals for defendants, motions to

dismiss are viewed by a number of defense counsel to be valuable as a means to introduce courts to various issues associated with section 36(b) litigation and to seek to more clearly define various of these issues.

51 *See, e.g.*, Curd v. SEI Invs. Mgmt. Corp., No. 13-cv-7219, 2015 U.S. Dist. LEXIS 90940 (E.D. Pa. Aug. 25, 2014) (order granting motion to dismiss, but giving plaintiffs leave to re-file); Ingenhutt v. State Farm Inv. Mgmt. Corp., No. 15-cv-1303 (C.D. Ill. June 22, 2016) (order granting motion to dismiss, but giving plaintiffs leave to re-file).

52 This strategy predates the recent wave of cases, and can be traced back to at least the early 2000s. *See generally* John Morley and Quinn Curtis, *Taking Exit Rights Seriously: Why Governance and Fee Litigation Don't Work in Mutual Funds*, 120 YALE L.J. 84, 117 (Oct. 2010) ("Anecdotal impressions from published opinions, conversations with practicing lawyers, and the evidence from our data set suggest strongly that plaintiffs' lawyers play a dominant role in initiating and running the great majority of section 36(b) suits. The vast majority of cases since 2000 were initiated by particular coalitions of plaintiffs' firms and involved the same standard set of claims and allegations.").

53 Indeed, a footnote in the Supreme Court's opinion in *Jones* can be read as affirmative support for the proposition that section 36(b) lawsuits can be resolved in favor of defendant advisers prior to trial, at least under certain circumstances. *See* Jones, 559 U.S. at 350 n.8 ("Comparisons with fees charged to institutional clients, therefore, will not 'doo[m] [a]ny [f]und to [t]rial.' … Only where plaintiffs have shown a large disparity in fees that cannot be explained by the different services in addition to other evidence that the fee is outside the arm's-length range will trial be appropriate." (citations omitted)).

54 *See* Gallus v. Ameriprise Fin., Inc., 675 F.3d 1173, 1182 (8th Cir. 2012), *aff'g*, 2010 U.S. Dist. LEXIS 138822 (D. Minn. Dec. 8, 2010) (affirming the district court's grant of summary judgment, concluding that plaintiffs "failed to meet the *Gartenberg* standard, as applied by *Jones*, and [that] summary judgment was appropriate").

55 Kasilag v. Hartford Inv. Fin. Servs. LLC, No. 11-cv-1083, 2016 U.S. Dist. LEXIS 47063 at *43 (D.N.J. Mar. 24, 2016) (order granting in part and denying in part the defendants' motion for summary judgment and the plaintiffs' motion for partial summary judgment) (determination by court that the independent directors' approval of advisory fees would be entitled to "substantial weight"); Sivolella v. AXA Equitable Life Ins. Co., No. 11-cv-4194 (D.N.J. Aug. 6, 2015) (order denying motions for summary judgment).

56 *See* Am. Chem. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp., No. 13-cv-1601 (N.D. Ala. Feb. 3, 2016) (order granting motion for summary judgment).

57 ICI MUTUAL INSURANCE COMPANY, MUTUAL FUND PROSPECTUS LIABILITY 18 & n.66 (2010).

58 The last section 36(b) lawsuit to proceed to trial was In re Am. Mut. Funds Fee Litig., No. 04-cv-5593, 2009 U.S. Dist. LEXIS 120597 (C.D. Cal. Dec. 28, 2009), *aff'd sub nom*, Jelinek v. Capital Research & Mgmt. Co., 448 Fed. Appx. 716, 2011 U.S. App. LEXIS 17821 (9th Cir. 2011). Prior section 36(b) lawsuits that proceeded to trial are the following: Kalish v. Franklin Advisers Inc., 742 F. Supp. 1222 (S.D.N.Y. 1990), *aff'd*, 928 F.2d 590 (2d Cir. 1991); Meyer v. Oppenheimer Mgmt. Corp., 715 F. Supp. 574 (S.D.N.Y. 1989), *aff'd*, 895 F.2d 861 (2d Cir. 1990); Krinsk v. Fund Asset Mgmt., 715 F. Supp. 472 (S.D.N.Y. 1988), *aff'd*, 875 F.2d 404 (2d Cir. 1989); Schuyt v. Rowe Price Prime Reserve Fund, 663 F. Supp. 962 (S.D.N.Y. 1987), *aff'd*, 835 F.2d 45 (2d Cir. 1987); Gartenberg v. Merrill Lynch Asset Mgmt., 573 F. Supp. 1293 (S.D.N.Y. 1983), *aff'd*, 740 F.2d 190 (2d Cir. 1984); Gartenberg v. Merrill Lynch Asset Mgmt., 528 F. Supp. 1038 (S.D.N.Y. 1981), *aff'd*, 694 F.2d 923 (2d Cir. 1982).

59 *See generally* ICI MUTUAL INSURANCE COMPANY, TRENDS IN FEE LITIGATION 16 (2014) (quoting industry defense counsel as saying, "[T]here have been perhaps 100 cases or so filed under section 36(b).… Of these, seven have actually made it to trial."); ICI MUTUAL INSURANCE COMPANY, MUTUAL FUND PROSPECTUS LIABILITY 18-22 (2010) (discussing incentives for settlements in securities class action lawsuits).

60 *See generally* Curtis and Morley, *supra* note 19, at 20-21 (detailing particulars of the "awkward settlement process" in section 36(b) cases).

[61] Section 36(b) provides that "[n]o … action shall be brought or maintained against any person *other than the recipient* of such compensation or payments…" (e.g., the fund adviser) (emphasis added). Nevertheless, from time to time over the years, plaintiffs have been known to seek to name fund independent directors as defendants. In the post-*Jones* era, plaintiffs have sought to name fund independent directors as defendants in only one case. That lawsuit has been dismissed. *See* Laborer's Local 265 Pension Fund v. iShares Trust, No. 13-cv-46 (M.D. Tenn. filed Jan. 18, 2013), *dismissed*, 2013 U.S. Dist. LEXIS 122613 (M.D. Tenn. Aug. 28, 2013), *aff'd*, 2014 U.S. App. LEXIS 18627 (6th Cir. Sept. 30, 2014), *cert. denied*, (U.S. Mar. 2, 2015) (No. 14-771).

[62] *Jones*, 559 U.S. at 331.

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1401 H Street NW, Suite 1000
Washington, DC 20005

800.643.4246
info@icimutual.com

www.icimutual.com

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