

Supreme Court Grants Certiorari in *Jones v. Harris Associates L.P.*

March 10, 2009

On March 9, the U.S. Supreme Court granted the plaintiffs' petition for a writ of certiorari in *Jones v. Harris Associates L.P.*, an excessive-fee case brought under Section 36(b) of the Investment Company Act of 1940. As discussed in a previous Morgan Lewis client alert regarding this case (http://www.morganlewis.com/pubs/IMFYI_GartenbergFactors_22may08.pdf), the Seventh Circuit's May 2008 decision in *Jones* disagreed with the approach that the Second Circuit took to such cases in *Gartenberg v. Merrill Lynch* (1982). *Gartenberg* set forth a six-factor test, frequently used by mutual fund directors in reviewing advisers' fees, that assisted courts in determining whether an adviser was charging "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."

The plaintiffs in *Jones* had asserted that the Oakmark funds' advisory fees were excessive when compared to the fees that the adviser charged for similarly managed institutional separate accounts, arguing that the fees should not have been compared to those of comparable retail mutual funds (as *Gartenberg* suggests) because fees in the mutual fund industry are set "incestuously" by funds that never change advisers. In rejecting the plaintiffs' claims, the Seventh Circuit articulated a process-oriented standard for Section 36(b) review, stating that "we now disapprove the *Gartenberg* approach," and opining that "[a] fiduciary must make full disclosure and play no tricks but is not subject to a cap on compensation. The trustees (and in the end investors, who vote with their feet and dollars), rather than a judge or jury, determine how much advisory services are worth."

In August 2008, the Seventh Circuit denied rehearing en banc, and the plaintiffs thereafter asked the Supreme Court to review the Seventh Circuit's decision. The Supreme Court granted the petition to resolve the split in the federal circuits regarding the *Gartenberg* factors, and will hear oral arguments in its October 2009 term. A decision is likely during 2010.

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