Pace Law Review

Volume 31
Issue 2 *Examining New York State Law*
Spring 2011

Article 8

April 2011

Jones v. Harris Associates: Shareholders' Consolation Prize in the Mutual Fund Fee Debate

Nicole Grospe
Pace University School of Law

Jones v. Harris Associates: Shareholders' Consolation Prize in the Mutual Fund Fee Debate

Nicole Grospe*

I. Introduction

Mutual funds have become one of the most popular investment vehicles for Americans today.[1] The mutual fund industry manages assets for more than ninety million Americans.[2] Unfortunately, these shareholders are feeling the detrimental effects of the structure of mutual funds and their fees. One of the biggest issues in the mutual fund industry is the risk of excessive fees. Many difficulties arise because of the relationship between a mutual fund's adviser and its board of directors, where both are essentially in positions to bite the hand that feeds them. The adviser not only manages the fund but also chooses the board. The "captive" board in turn determines the adviser's compensation. As a result, the relationships of these captive funds often lead to excessive fees. Congress has attempted to prevent this dilemma by passing the Investment Company Act of 1940. In particular, Section 36(b) provides that advisers and boards have a fiduciary duty to shareholders in charging reasonable fees.[3]

The mutual fund industry and its shareholders have since

---

* J.D., Pace University School of Law, 2011; B.S., Cornell University, School of Industrial and Labor Relations, 2007. The Author would like to thank Professor Edward Pekarek for his guidance and the staff of Pace Law Review for their efforts.

1. Caroline J. Dillon, *Do You Get What You Pay for? A Look at the High Fees and Low Protections of Mutual Funds*, 2006 Colum. Bus. L. Rev. 281, 282.

2. John P. Freeman et. al., *Mutual Fund Advisory Fees: New Evidence and A Fair Fiduciary Duty Test*, 61 Okla. L. Rev. 83 (2008).

3. 15 U.S.C. § 80a-35(b) (2000).

been impacted by judicial review and interpretation of the Section 36(b) fiduciary duty standard. The longstanding approach, established by the Second Circuit Court of Appeals in *Gartenberg v. Merrill Lynch Asset Management, Inc.*,[4] held mutual fund fees to be excessive if the fees charged were "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."[5] While the standard did not foreclose investor lawsuits against funds, no plaintiff investor has ever won a lawsuit under *Gartenberg*. In *Jones v. Harris Associates,*[6] the Seventh Circuit Court of Appeals turned this standard of Section 36(b) on its head, rejecting the *Gartenberg* opinion and advocating for an approach that would make it even more difficult for investors to bring suit for excessive mutual fund adviser compensation. The United States Supreme Court, in its March 30, 2010 opinion, overruled the Seventh Circuit decision and affirmed the *Gartenberg* standard.

This Note provides a critique of the Supreme Court decision in *Jones*. First, this Note offers an overview of the structure of mutual funds and their fees, as well as a background of a mutual fund's fiduciary duty under Section 36(b) of the Investment Company Act. Next, it contrasts the standard of Section 36(b) established in *Gartenberg* with the standard announced by the Seventh Circuit in *Jones*. Finally, this Note analyzes the Supreme Court's decision to affirm the *Gartenberg* standard and ultimately argues that the Court should have done more to protect the interests of shareholders.

---

4. 694 F.2d 923 (2d Cir. 1982); *see also* Jones v. Harris Assocs., 527 F.3d at 632 (7th Cir. 2008) *vacated and remanded*, 130 S. Ct. 1418 (2010).

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

6. *Jones*, 527 F.3d 627.

II. Mutual Funds: Structure and Fees

A. *Structure*

Mutual funds are open-ended funds[7] operated by investment companies that pool money from shareholders and invest it in stocks, bonds, and other financial securities.[8] The organization of a mutual fund involves an investment adviser, an underwriter of the fund's shares, and a custodian.[9] This Note focuses on the investment adviser. "The investment adviser is a professional money-manager, independent of, but tightly connected to, the mutual fund."[10] Typically, the investment adviser is an investment company that provides one or more mutual funds with investment services.[11] The adviser is responsible for investing the fund's assets and handling the day-to-day management of the fund, such as procuring staff, office-space, and overseeing administrative staff.[12] The adviser also establishes and controls the fund's board of directors. Legal requirements mandate the mutual fund boards be populated by independent directors.[13] Advisers' employees often obtain seats on the board as a result of the adviser's ultimate control.[14]

The adviser often organizes the fund's board with directors who have business or personal connections to the adviser or its executives.[15] The relationship between the adviser and the

---

7. An open-end fund is one that has no restrictions on the amount of shares that it will issue and buys back its shares at current asset value. BLACK'S LAW DICTIONARY 1045 (8th ed. 2004).

8. U.S. Sec. & Exch. Comm'n, *Mutual Fund*, http://www.sec.gov/investor/tools/mfcc/mutual-fund-help.htm (last visited Feb. 5, 2011).

9. William P. Rogers & James N. Benedict, *Money Market Fund Management Fees: How Much is Too Much?*, 57 N.Y.U. L. REV. 1059, 1063 (1982).

10. Emily D. Johnson, *The Fiduciary Duty in Mutual Fund Excessive Fee Cases: Ripe for Reexamination*, 59 DUKE L.J. 145, 152 (2009).

11. Dillon, *supra* note 1, at 284.

12. *Id.* at 283-84.

13. 15 U.S.C.A. § 80a-10 (West 2010).

14. *See* Dillon, *supra* note 1, at 284.

15. John M. Greabe et al., *Moving Beyond Gartenberg: A Process-Based and Comparative Approach to Section 36(b) of the Investment Company Act of*

fund is crucial. "The Second Circuit, in [*Gartenberg v. Merrill Lynch*], described the board's relationship with its fund as virtually 'unseverable.'"[16] Because of the close relationship between advisers and mutual funds, mutual funds are often called captives of their advisers.[17] "Because of this 'unseverable' relationship, the fund is usually limited to buying advisory services from a single provider."[18]

B. *Mutual Fund Fees*

The structure of mutual funds can have a problematic effect on advisory fees charged to mutual fund investors.[19] "Fees, which compensate advisers for portfolio management, are negotiated annually between the adviser and its captive fund's board."[20] Because the adviser and the board negotiate the fees, the negotiations are rarely at arm's length. "Not surprisingly, advisers typically do not negotiate fee agreements by vying against each other to land advisory contracts from mutual funds that are already up and operating. Rather, they create their own mutual fund 'clients' by forming, marketing, and managing the funds they advise."[21] The compensation is an advisory fee paid out of the assets of a fund. As a result, this may lead to the possibility of a windfall to the adviser. "When fund assets, and thus advisory fees, swell over time, but the advisor does not institute appropriate concomitant fee decreases (called 'breakpoints') to account for diminishing marginal management costs, the adviser pockets these huge sums."[22]

1940, 28 REV. BANKING & FIN. L. 133, 136 (2008).

16. Freeman et al., *supra* note 2, at 84.
17. Dillon, *supra* note 1, at 284.
18. Freeman et al., *supra* note 2, at 84.
19. Greabe et al., *supra* note 15, at 138
20. Freeman et al., *supra* note 2, at 84.
21. Greabe et al., *supra* note 15, at 136.
22. *Id.* at 183.

III. Regulating Mutual Funds: Advisers' Fiduciary Duty

The relationship between the adviser and board of a mutual fund can have a detrimental effect on shareholders. The adviser wants fees as high as possible, but the board is responsible, as the shareholders' agent, for negotiating the best deal possible for shareholders.[23] Of course, the board, which often consists of the adviser's business contacts, employees, and others who are partial to the adviser, does not always act on behalf of the shareholders' best interests.[24]

In 1940, Congress enacted the Investment Company Act "as a comprehensive federal regulatory scheme to protect investment company shareholders from self-dealing and other abuses that were perceived to be rampant throughout the mutual fund industry."[25] "As mutual funds experienced rapid growth in the 1950s and 1960s, investment advisers earned fees which did not necessarily reflect perceived economies of scale realized in managing larger funds."[26] The Securities and Exchange Commission (SEC) authorized the Wharton School of Finance and Commerce at the University of Pennsylvania to study the mutual fund industry in the wake of this sudden growth.[27] The Wharton Report found that investment advisers charged "relatively high rates," which competitive market forces did not reduce because of the close association between the advisers and the fund.[28] In addition, the report indicated that advisers charged substantially higher fees to mutual fund investors than those to institutional investors.[29]

In response to the SEC report, Congress added Section 36(b) to the Investment Company Act in 1970.[30] Section 36(b)

---

23. Dillon, *supra* note 1, at 287.

24. *Id.*

25. James N. Benedict et al., *Recent Developments in Litigation Under the Investment Company Act of 1940*, SM086 A.L.I. - A.B.A. 391, 405 (2007).

26. *Id.* at 406.

27. WHARTON SCH. OF FIN. & COMMERCE, A STUDY OF MUTUAL FUNDS, H.R. REP. NO. 87-2274, at 28 (1962).

28. *Id.* at 29.

29. *Id.*

30. *See* Daily Income Fund, Inc., et al. v. Fox, 464 U.S. 523, 537-38 (1984).

established a fiduciary duty "with respect to the receipt of compensation for services" between the investment advisor and the shareholders.[31] Section 36(b) also expressly provides a right of action for private citizens:

> An action may be brought under this subsection by the Commission, or by a security holder of such registered investment company on behalf of such company, against such investment adviser, or any affiliated person of such investment adviser, or any other person enumerated in subsection (a) of this section who has a fiduciary duty concerning such compensation or payments, for breach of fiduciary duty in respect of such compensation or payments paid by such registered investment company or by the security holders thereof to such investment adviser or person.[32]

IV. Section 36(b) Standard

A. Gartenberg v. Merrill Lynch Asset Management, Inc.

The key case that has set the standard for interpreting and applying Section 36(b) is *Gartenberg v. Merrill Lynch Asset Management, Inc.*,[33] a mutual fund excessive fee case decided in 1982.[34] In *Gartenberg*, plaintiff shareholders held shares in the money market fund[35] "Merrill Lynch's Ready Asset Trust."[36] They claimed that the fund "realized cost savings through economies of scale, but was not passing the savings on

31. 15 U.S.C.A. § 80a-35(b)(2) (West 2010).
32. *Id.* § 80a-35(b).
33. 694 F.2d 923 (2d Cir. 1982).
34. *Id.*
35. "A money market fund is a type of mutual fund that is required by law to invest in low-risk securities." U.S. Sec. & Exch. Comm'n, *Money Market Funds*, http://www.sec.gov/answers/mfmmkt.htm (last visited Feb. 8, 2011).
36. *Gartenberg*, 694 F.2d at 925.

to shareholders through lower fees."[37] Thus, plaintiffs alleged that the compensation paid by the fund to investment adviser, Merrill Lynch, was excessive and constituted a breach of fiduciary duty in violation of Section 36(b) of the Investment Company Act.[38] The district court entered judgment dismissing the plaintiff's case and found that the compensation paid to the adviser was fair.[39] On appeal, the plaintiffs contended that the court "erred in rejecting a 'reasonableness' standard for determining whether the [adviser] performed its 'fiduciary duty' in compliance with § 36(b)."[40] The plaintiffs also argued that the court erred in their analysis of the defendant's breach of fiduciary duty by comparing the management fees of the other money market funds.[41]

The Second Circuit Court of Appeals affirmed the district court's judgment.[42] The court held that, in order "[t]o 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."[43] In addition, the court set out six factors to consider when applying the fiduciary duty standard under Section 36(b): "(a) the nature and quality of services provided to fund shareholders; (b) the profitability of the fund to the adviser-manager; (c) fallout benefits: (d) economies of scale; (e) comparative fee structures; and (f) the independence and conscientiousness of the trustees."[44]

B. Jones v. Harris Associates

Jones v. Harris Associates[45] was the most recent mutual fund fee case that came before the Supreme Court. Harris

37. Johnson, *supra* note 10, at 158.
38. *Gartenberg*, 694 F.2d at 925.
39. *Id.*
40. *Id.* at 925, 927.
41. *Id.* at 929.
42. *Id.* at 934.
43. *Id.* at 928.
44. Johnson, *supra* note 10, at 159.
45. 527 F.3d 627, 632 (7th Cir. 2008) *vacated*, 130 S.Ct. 1418 (2010).

Associates L.P. is an investment advisement company that managed six open-ended funds collectively known as the Oakmark complex of funds, which was based Chicago, Illinois.[46] The Oakmark board annually reselected Harris as its investment adviser and, accordingly, determined Harris' compensation.[47] In determining such compensation, the board looked at various factors, including the services provided by Harris, the fees charged to other clients of Harris, the fees of other investment advisers charged to similar funds, and the fund's performance.[48]

The plaintiffs owned shares in several of the funds.[49] In August 2004, three plaintiffs-investors brought derivative suits on behalf of the mutual funds claiming that Harris was in violation of its fiduciary duty under Section 36(b) of the Investment Company Act. In their complaint, plaintiffs alleged that Harris charged Oakmark funds fees that far exceeded fees charged to other clients for identical services.[50] The District Court for the Northern District of Illinois applied the *Gartenberg* test and found that Harris' fees were not excessive because they were similar to those charged to other mutual funds.[51] The court held that, in order for plaintiffs to sustain a claim under Section 36(b), the plaintiff must show that the fees "were so disproportionately large that they could not have been the result of arm's-length bargaining."[52] Thus, Harris Associates was not in violation of 36(b) because its fees were "ordinary" and similar to those of other funds.[53] Accordingly, the court granted defendants summary judgment.

On appeal to the Seventh Circuit, the plaintiffs disclaimed the use of the *Gartenberg* standard.[54] First, the plaintiffs

46. *Id.* at 629; Jones v. Harris Assocs., 2007 WL 627640, at *2 (N.D. Ill. Feb. 27, 2007).

47. *Jones*, 2007 WL 627640, at *1.

48. *Id.*

49. *Jones*, 527 F.3d at 629.

50. *See* Matthew Rinegar, *Jones v. Harris Associates: Shareholder Requirements for Proving a Mutual Fund Adviser's Breach of Fiduciary Duty*, 5 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 45, 47 (2009).

51. *Jones*, 2007 WL 627640, at *7-8.

52. *Id.* at *7.

53. *Id.* at *8.

54. *Jones*, 527 F.3d at 632.

argued that the standard relies too much on market prices, which is "inappropriate because fees are set incestuously rather than by competition." The plaintiffs next argued that instead, the "market for advisory services to unaffiliated institutional clients" should be used as the benchmark of reasonable fees.[55] As the Seventh Circuit acknowledged, "[t]he first argument stems from the fact investment advisers create mutual funds, which they dominate notwithstanding the statutory requirement that 40% of trustees be disinterested. . . . The second argument rests on the fact that Harris Associates, like many other investment advisers, has institutional clients (such as pension funds) that pay less."[56] Accordingly, the plaintiffs claimed that Harris Associates charges its mutual fund shareholders significantly higher management fees than its institutional clients.[57] Fees for the Oakmark fund were 1 percent of the first two billion in assets, while independent clients were charged about .5 percent of the first five hundred million.[58]

Despite the plaintiffs' arguments, Judge Easterbrook of the Seventh Circuit gave an opinion affirming the lower court's judgment dismissing the claims against Harris Associates. While Judge Easterbrook was also skeptical of *Gartenberg*, he refused to use the approach for a very different reason, stating "just as the plaintiffs are skeptical of *Gartenberg* because it relies too heavily on markets, we are skeptical about *Gartenberg* because it relies too little on markets."[59]

The Seventh Circuit therefore established a new standard under 36(b), holding that "[a] fiduciary must make full disclosure and play no tricks but is not subject to a cap on compensation."[60] The court ultimately presumed that mutual fund markets are efficient and that this market competition

55. *Id.* at 631.

56. *Id.*

57. *Id.*

58. James F. Koehler & P. Wesley Lambert, *The Supreme Court's Review of Jones v. Harris Associates and 36(b) Claims Under the Investment Company Act of 1940—A Prospective and Analytical View*, 12 DUQ. BUS. L.J. 63, 69 (2009) (citing *Jones*, 527 F.3d at 631).

59. *Jones*, 527 F.3d at 632.

60. *Id.*

would establish the adviser's compensation.[61] The court further qualified its interpretation of 36(b), indicating that "[i]t is possible to imagine compensation so unusual that a court will infer that deceit must have occurred, or that the persons responsible for decision have abdicated . . . ."[62]

Chief Judge Easterbrook's majority opinion relies heavily on the existence of a competitive market.[63] Professor William A. Birdthistle of Chicago's Kent Law School noted the importance in Easterbrook's holding that "(a) the investment industry is very competitive, (b) . . . in any well-functioning industry, market competition keeps fees low, and (c) advisers 'can't make money' from its funds if 'high fees drive investors away.'"[64] Easterbrook emphasized the importance of disclosure, asserting that "[f]ederal securities laws . . . work largely by requiring disclosure and then allowing price to be set by competition in which investors make their own choices."[65] In addition, he "disregarded comparisons between institutional investors and captive mutual funds because 'no court would inquire whether a salary normal among similar institutions is excessive.'"[66]

Judge Easterbrook ultimately took a neoclassical economic approach to the case that depended on the notion that market forces will constrain advisory fees.[67] The court essentially found that "many sophisticated investors in hedge funds pay disproportionately high fees, and therefore, high fees alone are insufficient to support a fiduciary duty claim under the statute."[68] Thus, despite the incestuous relationship between mutual funds and their advisors, Easterbrook argued that investors still had the option to move their money elsewhere if

61. *Id.*

62. *Id.*

63. William A. Birdthistle, *Investment Indiscipline: A Behavioral Approach Mutual Fund Jurisprudence*, 2010 U. ILL. L. REV. 61, 91 (2010).

64. William Birdthistle, Chief Judge Easterbrook & Classical Law & Economics, THE CONGLOMERATE BLOG (Mar. 11, 2009), http://www.theconglomerate.org/2009/03/chief-judge-easterbrook-and-classical-law-economics.html.

65. *Jones*, 527 F.3d at 635.

66. Johnson, *supra* note 10, at 162.

67. Birdthistle, *supra* note 63, at 88-89.

68. Koehler & Lambert, *supra* note 58, at 72.

they found a mutual fund's fees to be too excessive.

On August 8, 2008, Judge Richard A. Posner filed a dissent to the Seventh Circuit's decision to deny a rehearing of the case.[69] His dissent disagreed with the Seventh Circuit's disapproval of the *Gartenberg* standard and highlighted the fact that *Jones* was the only case that disclaimed the Second Circuit opinion.[70] Posner emphasized that the majority's market forces approach was inappropriate and based upon "an economic analysis that is ripe for reexamination on the basis of growing indications that executive compensation in large publicly traded firms often is excessive because of the feeble incentives of boards of directors to police compensation."[71]

Posner criticized Easterbrook's reliance on market competition, arguing that "[m]utual funds are a component of the financial services industry, where abuses have been rampant . . . ."[72] Posner focused primarily on the disparity in advisory fees charged by mutual funds and those charged by institutional investors where captive mutual funds are charged more than twice that of institutional funds.[73] Posner addressed the problem of the absence of arm's-length bargaining in the mutual fund context.

Posner's dissent illustrated the modification of *Gartenberg*, or the *Gartenberg*-plus standard. He argued that there cannot be arm's-length negotiation when only comparing mutual fund fees among similar funds.[74] Rather, different fees should be examined in comparison to both mutual funds and institutional funds.[75] This, Posner argued, is the only way arm's-length negotiation would occur.[76] "Because 'the usual arm's length bargaining between strangers does not occur between an adviser and the fund,' the judicial task is to find a proxy for what arm's length bargaining might have produced."[77] The

69. *Jones*, 537 F.3d 728 (Posner, J., dissenting).
70. *Id.* at 729.
71. *Id.* at 730.
72. *Id.*
73. *Id.* at 731.
74. *Id.*
75. *Id.*
76. *Id.*
77. Greabe et al., *supra* note 15, at 161 (footnote omitted).

arm's-length transactions used by institutional investors "can and should be used as reliable benchmarks when judging the unfairness of prices set by a fund adviser for portfolio management services rendered to a captive fund."[78]

Judge Posner argued that this factor should include a comparison of the fees charged to mutual funds and those charged to institutional clients.[79] Essentially, "advisors should be able to pass the additional variable costs of administering a retail fund over an institutional fund to retail clients, but a management fee in excess of the additional administrative costs should strongly indicate investment advisors have breached their fiduciary duties."[80] Thus, the Posner standard acknowledges the unique nature of mutual funds and ultimately allows for increased shareholder protection from excessive fees as Congress intended in promulgating the 1940 Investment Company Act.

V. The Supreme Court Decision

On March 9, 2009, the Supreme Court granted certiorari to hear the case. The issue before the Court was what standard to apply when reviewing a claim of an investment adviser's excessive fee under 36(b) of the Investment Company Act. Particularly, the Court examined whether the Seventh Circuit contravened the Investment Company Act in holding that a shareholder's claim that the fund's investment adviser charged an excessive fee is not cognizable under 36(b).[81]

Justice Samuel A. Alito, Jr. delivered the majority opinion of the Court and upheld the longstanding approach set forth in *Gartenberg*:

> [W]e conclude that *Gartenberg* was correct in its basic formulation of what § 36(b) requires: to face liability under § 36(b), an investment adviser must charge a fee that is so disproportionately

78. Freeman et al., *supra* note 2, at 141.
79. Johnson, *supra* note 10, at 174.
80. *Id.* at 174-75 (footnote omitted).
81. *Id.*

> large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining.[82]

Justice Alito engaged in a systematic analysis of 36(b) and addressed the issue of "what a mutual fund shareholder must prove in order to show that a mutual fund investment adviser breached the 'fiduciary duty with respect to the receipt of compensation for services' that is imposed by § 36(b) of the [Act] . . . ."[83]

Justice Alito engaged in a defense of the *Gartenberg* standard, indicating that the veteran approach "fully incorporates [the] understanding of the fiduciary duty as set out in *Pepper* and reflects § 36(b)(1)'s imposition of the burden on the plaintiff."[84] Justice Alito also emphasized the standard's relationship to the protections provided by the Investment Company Act. In particular, the Court highlighted the importance of the Act's role in providing checks and balances on excessive fees. The Act focuses on "disinterested directors as 'independent watchdogs' of the relationship between a mutual fund and its adviser."[85] In turn, the Act requires advisers to provide directors with all the information "reasonably . . . necessary"[86] to determine whether an adviser's compensation is excessive. The Court then emphasized that *Gartenberg* encompasses the importance of providing some measure of deference to a board's judgment and that such measures of deference may vary depending on the circumstances.[87]

The Court next addressed the hot-button issue of comparing fees charged by an adviser to a captive mutual fund and those charged to its independent or institutional investors. In *Gartenberg*, the Second Circuit rejected a comparison of the fees the adviser charged a money market fund and those

82. Jones v. Harris Assocs. L.P., 130 S. Ct. 1418, 1426 (2010).
83. *Id.* at 1422.
84. *Id.* at 1427.
85. *Id.*
86. 15 U.S.C.A. § 80a-15(c) (West 2010).
87. *Jones*, 130 S. Ct. at 1421.

charged to a pension fund.[88] Justice Alito again took no sides and instead indicated that "courts must give comparisons . . . the weight they merit in light of the similarities and differences between the services that clients in question require . . . the court must be wary of inapt comparisons."[89] The Court also noted that courts should not rely too heavily on the fees charged by other advisers to mutual funds because they may not be the product of arm's length negotiations.[90]

Finally, Justice Alito noted how courts should evaluate an investment adviser's fiduciary duty. Courts should afford deference to the outcome of board's bargaining process when such process involves a "robust" review of investment-adviser compensation.[91] "Thus, if the disinterested 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."[92] On the other hand, the board's decision should be subject to more rigorous scrutiny if its negotiation and review process was "deficient" because an adviser's failure "to disclose material information to the board . . . might have hampered the board's ability to function as 'an independent check upon the management.'"[93] While courts may engage in this evaluation of a board's decision regarding adviser compensation, Justice Alito warned against "judicial second-guessing" as part of determining a 36(b) fiduciary breach.[94] "In reviewing compensation under § 36(b), the Act does not require courts to engage in a precise calculation of fees representative of arm's-length bargaining."[95]

While the Court noted the Seventh Circuit's error in focusing on disclosure, it left the debate between Judge Easterbrook and Judge Posner to Congress.[96] In his concurring opinion, Justice Thomas declined to characterize the majority

88. *Id.* at 1426 (citing *Gartenberg*, 694 F.2d at 930, n.3).
89. *Id.* at 1421.
90. *Id.*
91. *Id.* at 1429.
92. *Id.*
93. *Id.* at 1430 (citation omitted).
94. *Id.*
95. *Id.*
96. *Id.* at 1430.

opinion as an affirmation of the *Gartenberg* standard.[97] Rather, Justice Thomas assured that *Gartenberg* should not be read to "countenance the free-ranging judicial 'fairness' review of fees that *Gartenberg* could be read to authorize."[98] The Court vacated the Seventh Circuit decision and remanded the case for proceedings consistent with its opinion.[99]

VI. Debriefing the Supreme Court Decision

A. *The Consequences of Reaffirming* Gartenberg

In the great debate between Judge Easterbrook and Judge Posner, Justice Alito took no sides, but rather maintained the status quo in upholding the *Gartenberg* standard. Considering the heated Easterbrook-Posner conflict over the disclosure and comparative fee structures, Justice Alito's interpretation of 36(b) focuses more on the "watchdog" role of disinterested directors and the need for advisors to provide a board with the reasonable information necessary to determine whether an adviser's fee is excessive. This is significant, considering the impact the decision could and will have on mutual fund adviser compensation. As one scholar rightly predicted prior to the March 2010 decision, the Supreme Court's decision in *Jones* ultimately turned on whether the Court believed that courts should be determining the reasonableness of investment adviser fees.[100] In affirming *Gartenberg*, the Supreme Court took the position of maintaining the status quo of allowing courts to have some say in determining reasonable compensation, while also giving deference to the business judgment of mutual fund boards.

This decision is problematic for critics of the *Gartenberg* approach, and for plaintiff investors who have never won a suit under the standard. *Gartenberg* has been, for the last thirty years, the judicial standard for the determination of excessive fees under 36(b). However, a clear flaw in the *Gartenberg*

97. *Id.* at 1431 (Thomas, J., concurring).
98. *Id.*
99. *Id.* (majority opinion).
100. Koehler & Lambert, *supra* note 58, at 80.

standard has surfaced in light of Justice Posner's dissent. While *Gartenberg* acknowledged that the standard for testing the reasonableness of a fiduciary's compensation in a self-dealing transaction is an arm's length price,[101] it failed to specify from which marketplace the comparable market prices are to be extracted. As a result, *Gartenberg* allows funds to defend their fees by comparing them to fees paid by other mutual funds. This comparison would be reasonable if advisers competed with one another to service mutual funds, but as discussed above, the relationship between a mutual fund and its adviser does not allow for such competition to exist. As Judge Posner pointed out in his dissent, "[t]he governance structure that enables mutual fund advisers to charge exorbitant fees is industry-wide, so the panel's comparability approach would if widely followed allow those fees to become the industry's floor."[102]

Many scholars have also criticized the *Gartenberg* standard for its failure to provide meaningful shareholder protection.[103] The fact that no one has ever prevailed on a 36(b) claim suggests that most funds which have been sued maintain fees roughly proportionate to their competition.[104] In addition, *Gartenberg's* "so disproportionately large" language has been criticized as vague and contrary to the conception of fiduciary duty.[105] The language has enabled advisers to argue successfully that the 36(b) duty is narrow. The language also suggests that "relief is unavailable under § 36(b) unless a court is convinced as a substantive economic matter that a challenged fee is simply too high, without regard to either the fairness of the fee-setting process or the rates negotiated at arm's length by non-mutual fund clients of the adviser."[106]

While it seems that Justice Alito simply maintained the status quo, perhaps Justice Thomas was right in clarifying that

---

101. Freeman et al., *supra* note 2, at 140.

102. Jones v. Harris Assocs. L.P., 527 F.3d 728, 732 (7th Cir. 2008) (Posner, J., dissenting), *vacated and remanded by* 130 S. Ct. 1418, 176 L. Ed. 2d 265 (2010).

103. Johnson, *supra* note 10, at 166.

104. Koehler & Lambert, *supra* note 58, at 88.

105. Greabe et al., *supra* note 15, at 157.

106. *Id.*

the Court's decision was not an affirmation of the *Gartenberg* standard, but rather a clarification for future interpretations of *Gartenberg*. In his concurring opinion, Justice Thomas wrote that he "would not shortchange the Court's effort by describing it as affirmation of the '*Gartenberg* standard.'"[107] Rather, Justice Thomas warned against the way that the district court and court of appeals emphasized "fee 'fairness' and proportionality . . . in a manner that could be read to permit the equivalent of the judicial rate regulation the *Gartenberg* opinions disclaim."[108] In other words, courts must be wary of interpreting *Gartenberg* in a way that allows the judiciary to engage in actual rate regulation. This position that courts should not be too involved in determining compensation could explain the Supreme Court's decision not to modify *Gartenberg*.

B. *Overturning Judge Easterbrook and the Seventh Circuit*

The Supreme Court was very forceful in its rejection of Judge Easterbrook's disclosure-focused interpretation and his denunciation of the *Gartenberg* standard. Since the decision came out in 2007, Judge Easterbrook's market forces approach has faced a mountain of criticism. Among the biggest disagreements with the Seventh Circuit approach is its improper reliance on competition, its interpretation of the 36(b) statute contrary its language and purpose, and the establishment of a standard focusing only on disclosure. Justice Alito clearly stated that "[b]y focusing almost entirely on the element of disclosure, the Seventh Circuit panel erred."[109] In defense of *Gartenberg*, Justice Alito further stated that while the standard "which the panel rejected, may lack sharp analytical clarity . . . 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."[110]

107. Jones v. Harris Assocs., L.P., 130 S. Ct. 1418, 1431 (2010) (Thomas, J., concurring).

108. *Id.*

109. Jones v. Harris Assocs., 527 F.3d 627, 632 (7th Cir. 2008) *vacated*, 130 S.Ct. 1418 (2010).

110. *Id.*

In relying on a competitive market, Easterbrook's standard failed to even consider and take into account arm's length bargaining. "The court's decision ultimately put its faith in the presumed sophistication of individual investors to keep investment adviser fees competitive by shopping around for mutual funds with lower fees."[111] Judge Easterbrook, however, ignored the context of mutual funds and the fact that they are "often composed of interested parties, semi-interested parties, or advisers of other mutual funds, resulting in a truly 'captive' board more interested in creating profits for the adviser than the fund."[112]

Judge Easterbrook argued only that 36(b) requires disclosure, that there be no fraud, and acknowledges that compensation could be "so unusual" that a court would infer deceit.[113] Judge Easterbrook looked to the law of trusts[114] in articulating a new standard for 36(b) that "[a] fiduciary duty must make full disclosure and play no tricks . . . ."[115] While it is a crucial part of satisfying a fiduciary duty, disclosure alone would not protect fund shareholders from excessive fees.

Furthermore, Judge Easterbrook's standard essentially ignored the language and purpose of 36(b).[116] Judge Easterbrook's conclusion that 36(b) merely required that "[a] fiduciary must make full disclosure and play no tricks" eliminates the substance from the fiduciary duty.[117] Professor William A. Birdthistle argues that "[t]he specificity of the phrase 'with respect to the receipt of compensation for services' strongly suggests that Section 36(b) created a new kind of fiduciary duty beyond the simple avoidance of defrauding an investor, as Easterbrook suggested."[118] Indeed, the language of 36(b) itself "provides that the board's approval 'shall be given such consideration by the court as is deemed appropriate under

---

111. Rinegar, *supra* note 50, at 52.

112. *Id*.

113. Johnson, *supra* note 10, at 167.

114. Birdthistle, *supra* note 63, at 90.

115. Jones v. Harris Assocs., 527 F.3d 627, 632 (7th Cir. 2008) *vacated*, 130 S.Ct. 1418 (2010).

116. Johnson, *supra* note 10, at 168.

117. Birdthistle, *supra* note 63, at 90.

118. *Id.* at 99.

all circumstances.'"[119] This language implies a more thorough test regarding the excessiveness of fees, rather than Judge Easterbrook's narrow and deferential standard.[120]

C. *The Supreme Court's Consideration of* Gallus

In a decision that came out just months after *Jones,* the Eighth Circuit, in *John E. Gallus v. Ameriprise Financial*,[121] adopted and added to Posner's standard. The facts in *Gallus* are very similar to those in the *Jones* case. The plaintiffs were shareholders of eleven mutual funds that were advised by Ameriprise.[122] The plaintiffs asserted that Ameriprise breached its fiduciary duty under 36(b) for misleading the fund board during negotiations and demanding excessive fees.[123] The Eighth Circuit held that the district court erred in holding that no 36(b) violation occurred simply because the defendant's fee passed muster under the standard in *Gartenberg*.[124]

The Eighth Circuit focused primarily on the discrepancy between fees charged to institutional investors and those charged to mutual funds.[125] The court ultimately adopted a test that combines the *Gartenberg* factors and Judge Posner's standard. "The court found that a proper evaluation of § 36(b) should include a comparison between fees charged to institutional clients and mutual fund clients."[126] Furthermore, the Eighth Circuit indicated that "the proper approach to 36(b) is one that looks to both the adviser's conduct during negotiation and the end result."[127]

The Supreme Court appeared to consider the Eighth

---

119. Rinegar, *supra* note 50, at 52.

120. *Id.*

121. 561 F.3d 816, 822-23 (8th Cir. 2008), *vacated*, 130 S. Ct. 2340 (2010).

122. *Id.* at 818.

123. *Id.*

124. *Id.* at 823.

125. The plaintiffs presented evidence indicating that the fees charged by the adviser to retail mutual funds were nearly double those charged to institutional investors. *Id.* at 819.

126. Koehler & Lambert, *supra* note 58, at 75 (footnote omitted).

127. Gallus v. Ameriprise Fin., Inc., 561 F.3d 816, 822-23 (8th Cir. 2008), *vacated*, 130 S. Ct. 2340 (2010).

Circuit's approach to look "to both the adviser's conduct during negotiation and the end result."[128] Additional evidence of irregularities in the negotiation process should be relevant to the inquiry.[129] While the size of the fee itself is an important factor to consider, this factor "should not be construed to create a safe harbor of exorbitance."[130] The Eighth Circuit read the plain language of 36(b) to impose a duty of honesty and transparency on advisers during the negotiation process.[131] The justification for the inclusion of such evidence is found within other statutory and regulatory requirements of the Investment Company Act:

> Section 10(a) of the ICA requires that at least 40% of a fund's board of directors not be "interested persons" with regard to the adviser. Furthermore, Section 15(c) of the ICA requires that advisory fee agreements be approved by a majority vote of the disinterested directors cast in person at a special meeting "called for the purpose of voting on such approval" after the disinterested directors have been provided "such information as may reasonably be necessary to evaluate the terms of any contract." Advisory agreements that the adviser knows to have been made in violation of these structural requirements are void and subject to rescission under § 47(b) of the ICA.[132]

"Thus, a court entering a Section 36(b) claim may determine that a fee has been unlawfully received under Section 36(b) if it finds, as a threshold matter, that the adviser knows that the fee was not approved following deliberations by a disinterested board acting independently."[133] This was an

128. *Id.*
129. Koehler & Lambert, *supra* note 58, at 79.
130. *Id.* at 76.
131. *Gallus*, 561 F.3d at 823.
132. Greabe et al., *supra* note 15, at 160.
133. *Id.* at 160-61.

issue in *Jones*, where the adviser knew that the fee was approved by a conflicted board with a director who turned out to be interested, rather than disinterested. The Seventh Circuit dismissed evidence of the director's interested status. With the inclusion of evidence that occurred during negotiations, courts may determine that any "unscrupulous behavior" by an advisor during and after negotiations is a breach of that adviser's fiduciary duty under 36(b).[134]

Thus, the Supreme Court's consideration of the Eighth Circuit's look at adviser conduct could place more scrutiny on mutual fund boards and their determination of reasonable adviser compensation.[135] Emphasizing the watchdog role of disinterested directors, Justice Alito declared that "[u]nder the Act, scrutiny 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.'"[136] Justice Alito essentially stated that courts should afford fund boards deference when they have considered all the relevant factors in determining adviser compensation, but greater scrutiny is justified with evidence of some interference with a fund board's decision, such as an adviser's failure to disclose important information regarding compensation.[137] Thus, it seems that the Court clarified the *Gartenberg* interpretation of the 36(b) standard to emphasize both a board and adviser's ability to defend their fees determination.

D. *Critiquing the Supreme Court's Ruling*

Prior to the Supreme Court decision, two scholars provided an interesting observation:

> To predict the outcome, one must ask why the Supreme Court agreed to hear the case in the

134. *See Gallus*, 561 F.3d at 823.

135. Jessica Toonkel Marquez, *High Court Ruling Opens Door for More Lawsuits Over Mutual Fund Fees*, INVESTMENT NEWS, Apr. 4, 2010, http://www.investmentnews.com/article/20100404/REG/304049991.

136. *Jones*, 130 S. Ct. at 1427.

137. *Id.* at 1427-28.

> first place. No one has prevailed on a § 36(b) claim under the Gartenberg standard. The Seventh Circuit opinion lays down an even more arduous standard . . . . Perhaps the Supreme Court, as a sign of the times, feels compelled to set a standard plaintiffs can meet.[138]

While the Supreme Court may not necessarily have felt compelled to set an easier standard for plaintiffs, Justice Alito spent time explaining the Court's limited role in the determination of a fund adviser's excessive compensation. Justice Alito focused heavily on the fact that courts do not have rate-setting responsibilities.[139] "In reviewing compensation under § 36(b), the Act does not require courts to engage in a precise calculation of fees representative of arm's-length bargaining."[140] Furthermore, courts should not interfere with the business judgment and discretion of fund boards. Even conflicts of interest that may call for some restraints on board discretion do "not suggest that a court may supplant the judgment of disinterested directors apprised of all relevant information . . . ."[141]

Despite Justice Alito's reflection of "congressional choice 'to rely largely upon [independent director] 'watchdogs' to protect shareholders interests,'"[142] this Note argues that the Supreme Court should have adopted a more shareholder-friendly standard such as that advocated by *Gallus* and others as the proper determination of the 36(b) fiduciary duty standard. On appeal of *Gallus*, the Supreme Court reached a decision on April 5, 2010 to vacate the judgment and remand the case to the United States Court of Appeals for the Eighth Circuit in light of the Supreme Court's decision in *Jones*.[143] This decision raises questions as to the impact the Court's decision will have on the *Gallus* plaintiffs, and more importantly, for future

138. Koehler & Lambert, *supra* note 58, at 85.
139. *Jones*, 130 S.Ct. 1418.
140. *Id.* at 1430 (citation omitted).
141. *Id.*
142. *Id.* (alterations in original).
143. Ameriprise Fin., Inc. v. Gallus, 130 S. Ct. 2340 (2010).

plaintiff investors. The Court's affirmation of *Gartenberg* is essentially an affirmation of the plaintiffs' loss for advocates of a more proactive judicial stance on compensation that emphasizes the importance of the institutional and mutual fund fee comparison.

Thus, this Note asserts that the Supreme Court should have strongly considered the *Gallus* standard's emphasis on both the importance of disclosure as well as the inclusion of Posner's comparative fee structure. Justice Alito placed little weight on the debate over the comparative fee structure. The Court explained that "[e]ven if the services provided and fees charged to an independent fund are relevant, courts should be mindful that the Act does not necessarily ensure fee parity between mutual funds and institutional clients . . . ."[144] While the Act may not provide for assurances of fee parity, the *Jones* petitioners' argument for comparison of fees charged to institutional investors and those charged to mutual funds is certainly a valid one. In fact, the SEC also took this position in its amicus brief for the petitioners and relied on trust law.[145] The SEC urged the Court to interpret the 36(b) fiduciary duty in accordance with trust law and provided evidence from its own study, which concluded that "board and shareholder approval could not protect shareholder interests with respect to advisory compensation because mutual funds could not, as a practical matter, terminate their relationship with advisers."[146] Thus, in order to simulate arm's-length bargaining, courts should be able to engage in a comparison of fees charged to mutual funds with those charged to institutional investors, which does involve the arm's length bargaining of contracts.

While Justice Alito was merited in criticizing the Seventh Circuit's dominant focus on disclosure, the element of disclosure still warrants stronger consideration than that provided by the Court. The incorporation of disclosure into the interpretation of the fiduciary duty includes the importance of the comparative fee structure as a remedy to the arm's length bargaining concern in the mutual fund context. The *Jones*

144. Jones v. Harris Assocs., 130 S. Ct. 1418, 1429 (2010).
145. Koehler & Lambert, *supra* note 58, at 76-77.
146. *Id.* at 76.

petitioners argued that the fiduciary duty under 36(b) should consist of "an obligation to disclose 'all material facts relating to' compensation and an obligation that the compensation they receive be fair and negotiated for 'in an arm's-length transaction.'"[147]

In particular, the petitioners stated that Congress' use of the term "fiduciary duty" in 36(b) should be interpreted with its common law meaning.[148] Petitioners looked to the Supreme Court's rule of construction in *Neder v. United States*, which states that "'[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'"[149] The common law meaning of a fiduciary duty includes the accurate disclosure of all material facts to a beneficiary, as well as a fair transaction.[150] Thus, petitioners argue that, because Congress has not unequivocally expressed a contrary intent to the traditional definition to fiduciary duty, the Court should interpret the 36(b) fiduciary duty in accordance with its common law meaning. The petitioners also point out that the common law interpretation of fiduciary duty is in line with Congress' intent to include such a duty within 36(b):

> [The Supreme Court's cases] and the legislative history recognize Congress's understanding that arm's-length bargaining was absent from the usual captive mutual-fund structure and that investment advisers were obtaining economies of scale that should be shared with fund shareholders. The history further demonstrates

---

147. Rinegar, *supra* note 50, at 53.

148. Brief for Petitioners, *Jones*, 130 S.Ct. 1418 (No. 08- 586), 2009 U.S. S. Ct. Briefs LEXIS 451, at *10-11, *38-39; *see also* Rinegar, *supra* note 50, at 53 (discussing Petitioners'assertion that "§ 36(b) uses the term 'fiduciary duty,' a term which had a 'set' common law meaning").

149. Neder v. United States, 527 U.S. 1, 3 (1999) (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322 (1992)).

150. RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. b (1959); RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. g (2007).

> that Congress's purpose in enacting § 36(b) was to replace the unduly restrictive corporate waste standard for challenging adviser fees with a more effective standard anchored in familiar principles of fiduciary-duty law.[151]

While Justice Alito addressed this issue in his opinion and settled the dispute between petitioners and respondents regarding the meaning of "fiduciary duty" under 36(b),[152] he found it "unnecessary to take sides in this dispute,"[153] and merely reemphasized the Court's decision in *Pepper v. Litton*.[154] As stated above, petitioners argued that the meaning derives from trust law; respondents disagreed contending "that the term 'fiduciary' is not exclusive to the law of trusts" and that the term means different things in various contexts.[155] *Pepper* illustrates the burden and "rigorous scrutiny" imposed on directors "not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation . . . . The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain."[156] According to Justice Alito, this was the meaning of the 36(b) fiduciary duty. He argued that the Investment Company Act modified this duty by shifting "the burden of proof from the fiduciary to the party claiming breach, 15 U.S.C. § 80a-35(b)(1), to show that the fee is outside the range that arm's-length bargaining would produce."[157] While this may be true, petitioner's argument for the use of the common law meaning of fiduciary duty, and therefore the inclusion of disclosure as part of that duty under 36(b), should have been given more weight to allow for more adequate shareholder protections against excessive fees.

Petitioner's argument for the common law interpretation of

151. Brief for Petitioners, *Jones*, 130 S.Ct. 1418 (No. 08- 586) (June 10, 2009), 2009 U.S. S. Ct. Briefs LEXIS 451, at *28-29.

152. *Jones*, 130 S.Ct. at 1427.

153. *Id.*

154. 308 U.S. 295 (1939).

155. *Id.*

156. *Id.* at 1427 (citing *Litton*, 308 U.S. at 306-07) (emphasis omitted).

157. *Id.*

36(b) would constitute an expansion of the current *Gartenberg* standard because it would incorporate "more evidence into the analysis of objective fairness and also incorporates other procedural requirements of the [Investment Company Act] into the private action."[158] Furthermore, the Seventh Circuit's interpretation of the 36(b) standard constituted, as petitioners contend, a misstatement of an adviser's duty. The fiduciary duty of disclosure requires more than just the avoidance of playing tricks and committing fraudulent behavior.[159] Rather, it involves the disclosure of all material facts.[160]

Furthermore, 33(b) of the Investment Company Act provides obligations for advisers to comply with filing and disclosure requirements and makes unlawful the omission of "any fact necessary in order to prevent the statements made therein . . . from being materially misleading."[161] The purpose of these disclosure requirements is to help the market function rationally, since the disclosure of fees and potential conflicts of interest benefit those who purchase shares and pay attention to management fees.[162] The disclosure of fees was an issue in *Jones* "where the adviser failed to make required disclosures either of the deferred compensation agreement with its former-executive-turned-disinterested-director or the joint investments between fund directors and certain of the adviser's executive and employees."[163]

The requirement of disclosure and the comparative fee structure would ultimately facilitate the enforcement of 36(b). "In practice, for boards to compare their mutual fund's fee to the investment adviser's institutional clients' fees, the adviser would have to disclose clearly delineated fees, and report fees and expenses independently from one another."[164] Furthermore, any discrepancy between the fees charged to

---

158. Rinegar, *supra* note 50, at 53.

159. *Jones*, 130 S.Ct. at 1424.

160. Brief for Petitioners, *Jones*, 130 S.Ct. 1418 (No. 08- 586) (June 10, 2009), 2009 U.S. S. Ct. Briefs LEXIS 451,*21.

161. 15 U.S.C.A. § 80a-33(b) (West 2010).

162. Greabe et al., *supra* note 15, at 161.

163. *Id*. at 161-62.

164. Emily D. Johnson, *The Fiduciary Duty in Mutual Fund Excessive Fee Cases: Ripe for Reexamination*, 59 DUKE L.J. 145, 177-78 (2009).

retail investors and those charged to institutional investors should indicate breach. Thus, boards would have to require funds to justify an excessive cost, otherwise "they would be shirking their responsibilities to shareholders.[165] 36(b) does not give the board's decision conclusive weight, except only as such consideration is appropriate in all circumstances.[166] "[E]vidence a fund adviser or one of its affiliates treats an outsider more favorably than the very party to whom the adviser owes statutorily-provided fiduciary duties needs to be recognized for what it is: prima facie evidence of a breach of fiduciary duty."[167] Requiring full disclosure of fees as well as the comparison of institutional and retail investors would ensure more protection to shareholders.

VII. Conclusion

As the Eighth Circuit states, "[t]he *Gartenberg* case demonstrates one way in which a fund adviser can breach its fiduciary duty; but it is not the only way."[168] Indeed, the Supreme Court clarified yet another interpretation of the *Gartenberg* standard, highlighting its reflection of the true meaning of the Section 36(b) fiduciary duty:

> [T]he expertise of the independent trustees of a fund, whether they are fully informed about all facts bearing on the [investment adviser's] service and fee, and the extent of care and conscientiousness with which they perform their duties are important factors to be considered in deciding whether they and the [investment adviser] are guilty of a breach of fiduciary duty in violation of § 36(b).[169]

In focusing more on the role of disinterested directors, the

165. Johnson, *supra* note 10.
166. *Id.*
167. Freeman et al., *supra* note 2.
168. Gallus v. Ameriprise Fin., Inc., 561 F.3d at 823.
169. Jones v. Harris Assocs., 2010 WL 1189560, at *9.

Supreme Court decision may appear to place more pressure on mutual fund boards and advisers to provide reasonable fees. In fact, the Supreme Court's rejection of the Seventh Circuit's disclosure-only approach could signify a win for shareholders and perhaps lead to more mutual fund fee lawsuits.[170]

It seems more likely, however, that Justice Alito's decision to affirm the *Gartenberg* standard only maintains the status quo for plaintiff investors. While the Court's decision provides plaintiffs with the hope of winning lawsuits, it does not necessarily put them in a better position to win. Justice Alito ultimately ignored the significance of the comparative fee issue and whether a fund board's negotiation process involves arm's length bargaining at all. In balancing the importance of granting deference to mutual fund boards and advisers with the dangers of judicial rate-setting, perhaps Justice Alito was correct in keeping courts in their place and leaving the issues surrounding today's mutual fund market to Congress. However, the Supreme Court could and should have done more in the way of protection of shareholders.

170. Marquez, *supra* note 135.