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Litigator of the Week: Sean Murphy of Milbank, Tweed, Hadley & McCloy

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In defending a mutual fund adviser accused of charging excessive fees, the case can get complicated, so a wise defense lawyer will try to break the case into easily-understood pieces.

But what to do when opposing counsel does its best to make the case more confusing? Sean Murphy of Milbank, Tweed, Hadley & McCloy faced that in litigation accusing AXA Equitable Life Insurance Co. of charging excessive management and administrative fees.

Plaintiffs' counsel "threw a thousand pieces of mud on the wall," as Murphy put it, raising red herrings and distractions such as dinners the AXA fund trustees held at expensive venues like the 21 Club in New York.

Plaintiffs' counsel in the case presented a half-hour of direct testimony about the trustees' dinner bill at 21, which is next door to the AXA office, Murphy said. "We said it was patently absurd. Would a judge find it interesting? How do you know?"

A judge might easily get caught up in the mud-throwing, but Murphy prevailed on August 25 when U.S. District Judge Peter Sheridan of the District of New Jersey ruled for AXA Equitable Life Insurance Company in litigation accusing it of charging excessive management and administrative fees. Following a 25-day bench trial, Sheridan said the plaintiffs failed to demonstrate a breach of fiduciary duty or show any actual damages. Murphy was assisted by Milbank lawyers Robert Hora and James Cavoli at trial.

Sean Murphy of Milbank, Tweed, Hadley & McCloy.

The trial in *Sivolella v. AXA Equitable Life Insurance Co.* was the first in a crop of "manager of managers" cases now pending around the country, which target mutual fund advisers that delegate management functions to other companies while retaining most of the fees.

Murphy prevailed by resisting efforts by plaintiffs' counsel to go off into tangents.

"We didn't chase every piece of mud. We stuck to our core message, and if we got a signal from the

judge that something was at issue, we dealt with it," Murphy said.

Plaintiffs in the AXA case were seeking $550 million, but Sheridan's 159-page ruling found the plaintiff's four experts lacking in credibility.

In particular, Sheridan listed a half-dozen instances when certified public accountant Kent Barrett, a plaintiff's expert, contradicted himself. "It is difficult to assess what is true, half-true or not true from his statements. As such, the court gives Barrett's testimony little weight," Sheridan said.

The ruling is significant because many of the other "manager of managers" cases now pending employ the same experts that were used in the AXA case, said Murphy. It's too late in the game for the plaintiffs in those cases to try to trade in their experts for others, he said.

In early 2017, Murphy will represent Hartford Investment Financial Services at trial in one such case before U.S. District Judge Renee Bumb in Camden. The plaintiff firm in that case, Szaferman, Lakind, Blumstein & Blader of Lawrenceville, also represented the plaintiffs in the AXA litigation.

And in another case of the same type, *McClure v. Russell Commodity Strategies Fund*, pending in the District of Massachusetts, Murphy has filed a motion for summary judgment on behalf of the defendant. A San Diego firm, Robbins Arroyo, represents the plaintiffs.

The AXA ruling will be significant in the Hartford case because it dismisses the core theory that a mutual fund that uses a subadvisor but keeps the fee is a per se violation of securities law, Murphy said. "That was wholeheartedly rejected by the judge," he said.

The AXA ruling also says mutual funds are free to price enterprise risk into their fees--a holding that will benefit all fund managers, he said. Enterprise risk includes business, operational and litigation risks that investment advisers face in their business, he said. The penalties that numerous fund advisors paid in connection with mutual fund market timing scandals in 2004-06 are one example of enterprise risk, he said.

The AXA case was the first mutual fund fee case under Section 36(b) of the Investment Company Act of 1940 to go to trial since 2010, said Murphy. But such fee cases have seen an uptick in recent years, as case law has made it hard to bring a classic falling stock case, and markets have been on a bull run, he said. Cases under Sec. 36(b) are cyclical, with more filed when the market is up, he said.

About 20 excessive fee cases are pending nationwide, and nine of those employ the manager of managers theory, Murphy said.

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