

MEMO# 30434

November 30, 2016

Court Rules That Trustees Cannot Rely on Attorney-Client Privilege in Section 36(b) Action

[30434] November 30, 2016 TO: Investment Company Directors SUBJECTS: Litigation & Enforcement RE: Court Rules That Trustees Cannot Rely on Attorney-Client Privilege in Section 36(b) Action

The United States District Court in the Western District of Washington at Seattle recently issued an order in a Section 36(b) “excessive fee” case, *Kenny v. PIMCO Investments*, compelling fund independent trustees to produce documents they had redacted or withheld under the attorney-client privilege. The court determined that the communications between the trustees and their counsel were not entitled to protection because the “fiduciary exception” to the attorney-client privilege applies.

The court found that the fund, which was a Massachusetts business trust, was “indisputably set up as a trust,” and that, “[t]he Independent Trustees clearly owed a fiduciary duty to Plaintiff and other shareholders.” The court further noted that, “The communications at issue include legal advice for managing the fund, not personal advice to the Trustees, and the communications were not made in anticipation of this or any other litigation.” The court rejected the Trustees’ arguments that no court has ever extended the fiduciary exception to the fund industry or Section 36(b) lawsuits, that it is “wholly incompatible with the legal framework governing mutual funds” and that it would “destabilize the mutual fund industry to the detriment of all shareholders.”

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[Attachment](#)

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