

MEMO# 15207

September 25, 2002

APPEALS COURT AFFIRMS DISMISSAL OF SECTION 36(B) CLAIM

[15207] September 25, 2002 TO: CLOSED-END INVESTMENT COMPANY MEMBERS No. 45-02 DIRECTOR SERVICES COMMITTEE No. 7-02 SEC RULES MEMBERS No. 80-02 RE: APPEALS COURT AFFIRMS DISMISSAL OF SECTION 36(b) CLAIM The Third Circuit Court of Appeals recently affirmed the dismissal of the amended complaint in a case alleging breach of fiduciary duty under Section 36(b) of the Investment Company Act of 1940.¹ The plaintiff, a fund shareholder, alleged that the adviser breached its fiduciary duty with respect to the receipt of compensation. He sought to recover fees paid to the adviser on the basis that the management and distribution agreements were not approved properly because at least 40% of the board was not independent. According to the plaintiff, the directors were not independent because they serve on numerous other boards managed by the defendant adviser and receive large aggregate compensation for their combined services. The amended complaint also alleged that the fees were excessive. The district court dismissed the amended complaint finding that the plaintiff failed to allege sufficient facts that, if true, would support either of the claims. The appeals court upheld the dismissal, relying heavily on the analysis by the Fourth Circuit in a similar case.² In addition, the court rejected the plaintiff's claim that the district court abused its discretion when it did not allow him to amend the complaint a second time. The court found that the plaintiff was on notice prior to filing the amended complaint that case law was developing that supported the defendant's argument that service on multiple boards does not make a director an "interested person." Marguerite C. Bateman Associate Counsel Attachment (in .pdf format) Note: Not all recipients receive the attachment. To obtain a copy of the attachment, please visit our members website (<http://members.ici.org>) and search for memo 15207, or call the ICI Library at (202) 326-8304 and request the attachment for memo 15207. 1 Krantz v. Prudential Investments Fund Management LLC, et al. (No. 02-1266)(3rd Cir. Aug. 30, 2002). 2 Migdal v. Rowe Price-Fleming Int'l Inc., 248 F.3d 321 (4th Cir. 2001).