

MEMO# 19169

September 16, 2005

U.S. DISTRICT COURT DISMISSES SECTION 36 CLAIMS RELATING TO FUNDS' NON-PARTICIPATION IN CLASS ACTION SETTLEMENTS

©2005 Investment Company Institute. All rights reserved. Information may be abridged and therefore incomplete. Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice. [19169] September 16, 2005 TO: BOARD OF GOVERNORS No. 45-05 PRIMARY CONTACTS - MEMBER COMPLEX No. 37-05 SEC RULES MEMBERS No. 101-05 SMALL FUNDS MEMBERS No. 79-05 RE: U.S. DISTRICT COURT DISMISSES SECTION 36 CLAIMS RELATING TO FUNDS' NON-PARTICIPATION IN CLASS ACTION SETTLEMENTS The U.S. District Court for the Northern District of Illinois, Eastern Division, granted motions to dismiss in two separate class action lawsuits involving allegations that the investment advisers and boards of directors for two families of mutual funds failed to cause the funds to participate in multiple class action settlements for which the funds were eligible.¹ According to the complaints, plaintiffs suffered losses by forfeiting their share of settlement proceeds. In both cases, the plaintiffs charged defendants with violations of Sections 36(a), 36(b), and 47(b) of the Investment Company Act of 1940 ("ICA"), and with breach of fiduciary duty and negligence claims under state law. In granting the defendants' motions to dismiss, the judge in each case determined that: The plain statutory text of Section 36(a) provides a private right of action only for the SEC, and does not permit mutual fund investors to initiate a claim for breach of fiduciary duty involving personal misconduct; While Section 36(b) does provide a private right of action for a fund shareholder, the action must relate to a fiduciary duty with respect to the "receipt of compensation for services," which was not the case here, where plaintiffs alleged only that defendants failed to cause the funds to participate in class action settlements; Plaintiffs had no claim under Section 47(b) since the Section 36 claims were dismissed and no other violation occurred under the ICA; and 1 Dull v. Arch, Case No. 05 C 140, N.D. Ill., 2005 U.S. Dist. LEXIS 14988 (July 27, 2005); and Jacobs v. Bremner, Case No. 05 C 143 N.D. Ill., 2005 U.S. Dist. LEXIS 14762 (July 20, 2005). 2 The Court would not retain jurisdiction over the state claims because all the federal claims were dismissed before trial. Barry E. Simmons Associate Counsel