

Corporate & Financial Weekly Digest

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Court Dismisses Case Against Mutual Fund's Distributor and Trustees Concerning 12b-1 Fees

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On March 30, in *Wiener v. Eaton Vance Distributors, Inc.*, the U.S. District Court for the District of Massachusetts dismissed an Eaton Vance Municipals Trust shareholder derivative suit involving Eaton Vance Distributors, Inc. and the Trust's nine trustees, alleging that the asset-based Rule 12b-1 fees paid by the Trust to Distributors and selling broker-dealers who distribute Trust mutual fund shares violated the Investment Advisers Act of 1940 since neither Distributors nor the selling broker-dealers were registered under the Advisers Act. The plaintiff sought, among other things, the rescission of the distribution agreement between the Trust and Distributors under Section 47(b) of the Investment Company Act of 1940 (1940 Act).

Section 47(b) creates a private right of action for a party to void a contract that involves a violation of the 1940 Act or any rules thereunder. The plaintiff argued that the alleged violations of the Advisers Act constitute violations of Section 36(a) of the 1940 Act (allowing the Securities and Exchange Commission to bring enforcement actions against, among others, fund trustees and principal underwriters for breaches of fiduciary duties) and SEC Rule 38a-1 (requiring investment companies to establish and maintain adequate compliance policies and procedures) as grounds to rescind the distribution agreement. The court rejected these arguments, stating that Section 47(b) covered violations of the 1940 Act, not of the Advisers Act, and declined to create a private right of action under Section 36(a). The court also stated that the complaint failed to allege a violation of Rule 38a-1 and declined to imply any general duties arising out of the rule.

The *Wiener* case dismissal follows the October 2010 dismissal of a virtually identical complaint filed in the U.S. District Court for the Northern District of California against Franklin/Templeton Distributors, Inc.

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