Trailing Fees Class Action Commenced

April 10, 2018

On April 9, 2018, a prominent plaintiff-side class action law firm in Toronto issued a proposed class action against TD Asset Management Inc. ("TD") claiming over $200,000,000 in damages. The representative plaintiff, Gary Stenzler, is a unitholder of mutual funds for which TD is the trustee (the "TD Funds"). Mr. Stenzler holds the relevant units in the TD Funds through a discount broker. The proposed class includes all persons who held or hold units in TD Funds through a discount broker.

The claim alleges that, according to the TD Funds' Fund Facts documents, TD pays trailing commission fees from the assets of the TD Funds to brokers as compensation for "services and advice" provided to unitholders. The claim further alleges that since discount brokers are precluded by IIROC rules from providing any advice to unitholders, and since discount brokers provide effectively no service to unitholders, there is no basis for TD, as trustee, to pay the discount brokers any commissions on this basis.

The claim pleads two primary causes of action. First, the claim alleges that by paying trailing fees to discount brokers who did nothing to earn them, TD as the trustee of the TD Funds breached the fiduciary duties that the plaintiff alleges TD owes to the unitholders of the TD Funds. The plaintiff alleges TD owes these fiduciary duties pursuant to the TD Funds' declarations of trust (the claim alleges that all of the relevant funds are organized as trusts), and pursuant to section 116 of the Ontario *Securities Act*. In both cases, the plaintiff alleges that TD owes a duty to the unitholders to act honestly, in good faith, and in the unitholders' best interest. The allegation is that by paying the trailing fees even though the plaintiff alleges there was no basis to do so, TD impermissibly dissipated the trust property, in breach of trust. The claim further alleges that because some of the impugned trailing fees were paid to TD's own discount brokerage, TD Direct Investing, TD was in a conflict of interest and further breached its fiduciary duties by paying those fees.

Second, the claim alleges an actionable misrepresentation in the TD Funds' Fund Facts documents, which are incorporated in the TD Funds' Simplified Prospectuses. The plaintiff alleges that the documents represent that trailing commissions would be paid to brokers in respect of "services and advice". The plaintiff alleges that the discount brokers were not actually paid in respect of "services and advice" (as it alleges that the discount brokers provided neither) and, therefore, the Simplified Prospectus and Fund Facts contained a misrepresentation. The plaintiff claims this constitutes an actionable misrepresentation pursuant to section 130 of the Ontario *Securities Act*.

Finally, the plaintiff alleges that since certain TD funds offer Series D units, designed with no trailing fees related to service or advice and meant to be sold through discount brokers, TD breached its duties to the unitholders of units in other series by allowing them to hold those units through discount brokers. The plaintiff alleges that TD should have only allowed Series D units to be held through discount brokers.

By

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