

TD Mutual Fund Trailing Commission Class Action

Summary Rationale for Settlement reached on behalf of investors who held TD Mutual Funds through discount brokers

This class action (“**Westwood Action**”) is on behalf of all investors who held TD Mutual Fund units through a discount broker (“**Class Members**”).¹ The Defendant is TD Asset Management Inc. (“**TDAM**”) the trustee and manager of the TD Mutual Funds. The Plaintiff in the *Westwood Action* asserts, among other things, that TDAM improperly paid trailing commissions to discount brokers on behalf of Class Members resulting in Class Members suffering a loss in value of their TD Mutual Fund units. The Plaintiff says that the payment of those trailing commissions was a breach of trust and fiduciary duty, and that TDAM did not adequately or accurately disclose the fact or purpose of those payments to the Class Members.

The Settlement Agreement, if approved by the Court, provides that TDAM will pay \$70.25 million for the benefit of Class Members in exchange for the full and final release of the claims asserted in the *Westwood Action*. TDAM denied and continues to deny the allegations made in the *Westwood Action*.

The following is a brief summary of some of the important risk factors considered by the Plaintiff and the lawyers for the Class in concluding that the Settlement is fair and reasonable. These factors, and others, will be explained in greater detail in the motion materials to be filed in support of Court approval of the Settlement, which will be posted at <https://www.siskinds.com/class-action/mutual-fund-trailing-commissions/> in advance of the settlement approval hearing scheduled for December 9, 2024.

The factors discussed below are case-specific risks that arose on the particular facts of the *Westwood Action*. In addition to these case-specific risks, there are also generic risks that are inherent in all litigation that influence the range of outcomes. Such generic risks refer to the risks arising from the passage of time, and the procedural risks that exist in litigation of this complexity, such as the risk that witnesses will not appear or will not give the evidence expected of them, and the risk of adverse procedural or evidentiary rulings. With the passage of time, documentary evidence may no longer be available, and witnesses may no longer be available or their memories of the material events may fade, all of which would impact the ability to win the case.

The risk that the Court would find that there was no misconduct

TDAM argued that its conduct was not illegal or otherwise in breach of its obligations. TDAM argued that the mutual fund industry is heavily regulated in Canada and regulators permitted the payment of trailing commissions to discount brokers. It was not until June 2022 that trailing commission payments to discount brokers were banned. TDAM complied with the ban and stopped paying trailers at that point in time. TDAM argued that

¹ The Class is formally defined as: All persons, wherever they may reside or be domiciled, who held or hold, at any time on or prior to September 11, 2024, units of a TD Mutual Fund through a discount broker, except for the Excluded Persons. For more information on the class definition see the long form notice, which is available [here](#).

it cannot be forced to compensate investors for trailing commission payments made when it was legally allowed to make them.

In a class action brought against discount brokers arguing that they should not have received trailing commissions, the Court accepted similar arguments in dismissing the action.² If the Court accepted these arguments in the *Westwood* Action, there would be no recovery for Class Members.

The risk that the Court would conclude that Class Members, acting reasonably, ought to have been aware of the alleged misconduct

TDAM argued that the trailing commission payments to discount brokers were fully disclosed to Class Members and that they would have known about those payments and that the payments were causing a loss if they had acted reasonably. If this argument was successful, it could have led the Court to find that certain defences were available to TDAM limiting Class Members' potential recovery or resulting in no recovery for some or all Class Members.

First, TDAM raised a limitation period defence. A limitation period is the legal term for a time limit to commence litigation. Losses from wrongful conduct generally cannot be recovered through litigation unless the litigation is started within 2 years of the date on which a person would have discovered their claim if they had been reasonably diligent – *i.e.* when the person ought reasonably to have known that they suffered a loss because of the defendant's misconduct.

TDAM's limitation period argument was that a reasonable person would have discovered their claim at the time they purchased their TD Mutual Fund units because the payments were disclosed in the documents that were required to be sent to, or were available to, investors acquiring TD Mutual Funds. If this argument was accepted, any losses in relation to trailing commissions paid more than 2 years prior to the action being commenced would not be recoverable. Alternatively, a more extreme version of this argument was that any losses in relation to trailing commissions paid on mutual fund units purchased more than 2 years prior to the action being commenced would not be recoverable, even if the trailing commissions were paid less than 2 years prior to the action being commenced.

Second, TDAM relied on a defence that, because the Class Members ought to have been aware of the payment of trailing commissions to discount brokers, they consented to the payments and cannot resile from that consent. If accepted, this would be a full defence to the claims.

The risk that a significant number of Class Member claims were released

TDAM argued that, under terms of the operative trust instruments, Class Members who redeemed their TD Mutual Fund units (*i.e.* sold them) released their claims against TDAM

² *Frayce v. BMO Investor Line Inc. et al*, [2023 ONSC 16](#).

with respect to those units. If the Court accepted this argument, then those Class Members would not have a claim for the TD Mutual Fund units they redeemed.

The risk that the Court would reduce damages for services provided by discount brokers

TDAM argued that any recovery should be limited to the actual trailing commissions paid by TDAM minus a reasonable payment for the purported services provided by discount brokers to Class Members. TDAM contended that a reasonable payment would be the annual discount series trailing commission rate of 0.25% of an investor's TDAM mutual fund holdings (note – the advisor or full-service trailing commission typically ranges from 0.50% to 1.00%).

If the Court accepted this argument, it would result in a reduction of the aggregate value of the trailing commissions paid at issue in the *Westwood* Action by approximately 52%. There may be no loss suffered by Class Members who held any discount series TD Mutual Fund units (D-series or e-series) or other series paying less than 0.25%. The recovery on all other series would be the trailers paid minus the annual 0.25% purportedly reasonable trailing commission.