No certification for Boal investors – Fiduciary duty ruled individual issue

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The evolving landscape of fiduciary duties in the investment industry

Since the Client-Focused Reforms were introduced in 2019, the investment industry has been closely following whether these reforms will result in Courts imposing fiduciary duties on registrants.

Against this backdrop, the proposed class action in *Boal v. International Capital Management Inc. et al.* (*Boal*) has been closely watched as a test case. Starting in 2021 and culminating in a 2023 decision by the Ontario Court of Appeal, *Boal* recognized that investment advisors may owe fiduciary duties to clients in the context of non-managed accounts.

Most recently, an October 21, 2024 decision from Justice Akbarali refused to certify the proceeding in *Boal* as a class action due to a lack of commonality, finding that whether or not the defendants owed a fiduciary duty to their clients is an individual issue (2024 ONSC 5803). While this recent decision closes the door on *Boal* continuing as a class action, it leaves open whether the defendants owed a fiduciary duty to one or more of the affected investors.

What you need to know

- Fiduciary duties are highly fact-specific. In *Boal*, there was significant variability among the advisor-client relationships and the products purchased, which decisively weighed against the prospect of providing common answers through a class action.
- The mere fact that an investment advisor operates in a securities regulatory environment is likely not enough, on its own, to give rise to a fiduciary relationship between the investment advisor and their client. However, the recent *Boal* decision leaves open the possibility that an investor such as the representative plaintiff could establish a breach of fiduciary duty claim based on their individual circumstances.
- In the context of a proposed class action against an investment advisor, breaches of regulatory rules (even systematic ones) may not be sufficient to establish the commonality requirement that must be satisfied as a precondition to certification.

- In *Boal*, the Courts considered regulatory rules requiring registrants to deal fairly, honestly and in good faith with clients and to address conflicts of interest in the "best interest of the client". The Courts are likely to increasingly look to the Client-Focused Reforms, which impose an analogous "best interest" standard, in assessing an advisor's standard of care.

Background

The defendants, the Sanchez brothers, were the principals of International Capital Management (ICM), an investment advisor corporation registered in Ontario with the Mutual Fund Dealers Association (MFDA), as it was then called. Through ICM, the Sanchez brothers promoted and sold promissory notes in a factoring company called IPS to a subset of their clients. The Sanchez brothers and ICM (the Sanchez defendants) allegedly failed to disclose to their clients that they had a significant ownership interest in IPS and that they were receiving commissions on each promissory note.

In 2016, the plaintiff, Ms. Boal, learned that the MFDA was investigating the Sanchez defendants and seeking to stop them from selling the IPS promissory notes. Ms. Boal commenced a proposed class action against the Sanchez defendants for breach of fiduciary duty, among other things, due to their failure to disclose their non-arm's length relationship with IPS.

In 2018, the Sanchez brothers entered into a settlement with the MFDA, in which they admitted to selling or facilitating the sale of $25.8 million of investments in IPS.

The initial certification motion

In 2021, Justice Perell of the Superior Court dismissed a motion to certify the proceeding as a class action (2021 ONSC 651). He concluded that there was no viable claim based on an *ad hoc* fiduciary relationship on a class-wide basis. This decision was upheld by the Divisional Court (2022 ONSC 1280).

However, the Ontario Court of Appeal reversed the decisions below (2023 ONCA 840). The Court of Appeal held that, as pleaded, each member of the proposed class had a relationship of vulnerability, trust, and reliance with the Sanchez brothers. The Court of Appeal remitted the matter back to the Superior Court for fresh consideration of the common issues and preferable procedure criteria for certification.

The second certification motion

In a decision released on October 21, 2024, Justice Akbarali refused to certify the proceeding as a class action (2024 ONSC 5803). With the Court of Appeal having addressed the cause of action criterion, Justice Akbarali focused on whether there was a sufficient evidentiary basis to certify common issues concerning the alleged class-wide breach of fiduciary duty.

In seeking to establish the existence and content of class-wide fiduciary relationships, the plaintiff emphasized the following uncontroverted evidence: (i) the existence of the

MFDA rules; (ii) the evidence of the Sanchez brothers that they considered each clients' investment goals and made investment recommendations based on the clients' best interests; (iii) the evidence of the Sanchez defendants that they solicited investments in the IPS notes and recommended that proposed class members purchase the IPS notes. Justice Akbarali characterized the first two factors as "neutral" because they "are evidence of the Sanchez defendants doing their job in a regulated environment" and held that the law is "clear" that "this is not sufficient to give rise to a fiduciary relationship". Her analysis was therefore focused on the third factor which she characterized as "a necessary fact that situates the breach of fiduciary duty claim in its context."

Justice Akbarali ultimately concluded that the lack of commonality among proposed class members was fatal to certification. In dismissing certification, she made the following findings of fact: (i) different investors had different understandings about the commissions charged by the Sanchez defendants in respect of the promissory notes, (ii) there was significant variation in the investors' sophistication, (iii) the investors placed vastly differing levels of trust in the Sanchez defendants, (iv) there were differences in what the investors understood about the Sanchez defendants' ownership interest in IPS, and (v) the investors relied to varying degrees on the recommendations and advice offered by the Sanchez defendants in making their own investment decisions. In fact, none of the proposed class members had managed accounts.

Based on this evidence, Justice Akbarali concluded that there was no basis that the existence of a class-wide fiduciary duty, its content, or its breach, could be determined in common across the class. Instead, she concluded that: "The determination of whether any particular client was in a fiduciary relationship with the Sanchez defendants (or some, or any, of them) requires an individual inquiry". In reaching this conclusion, Justice Akbarali emphasized that while the Sanchez defendants had violated the MFDA rules, "that is a separate question from the commonality of the question of whether there is some basis in fact to conclude there is a common issue as to whether there exists a class-wide fiduciary duty that has been breached."

Implications

Subject to possible appeals, Justice Akbarali's decision ends the prospect of *Boal* continuing as a class action. The decision has implications from both a litigation and advisory perspective.

First, the decision does not conclusively determine whether Ms. Boal or any of the other investors stood in a fiduciary relationship. Ms. Boal and the other investors remain entitled to pursue their claims on an individual basis, rather than using the procedural vehicle of a class action.

Second, each of the *Boal* decisions has opined on the impact of securities regulatory standards on whether and when an investment advisor owes fiduciary duties, underscoring the courts' interest in this area (see our previous analysis of the Divisional Court and Court of Appeal decisions). Given the unsettled nature of the law to date, investment advisors must take care to fully disclose and address conflicts of interest, as the professional requirement to resolve material conflicts of interest in the best interest of the client may be found to give rise to a fiduciary obligation. For a refresher on

conflicts of interest following the Client-Focused Reforms, see BLG's previous article on the Client-Focused Reforms here.

Third, the refusal to certify a class-wide breach of fiduciary duty claim in *Boal* does not spell the end of attempts to pursue class actions against securities advisors, dealers, and registered representatives. Whether sufficient commonality exists turns on the facts of a particular case.

BLG will continue to monitor further developments in *Boal*, as well as other court decisions, to assess the impact of the Client-Focused Reforms. For more information please reach out to any of the key contacts listed below.

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