

# Re Claggett

IN THE MATTER OF:

**The Dealer Member Rules of the Investment Industry Regulatory  
Organization of Canada (IIROC)**

**and**

**The By-Laws of the Investment Dealers Association of Canada (IDA)**

**and**

**Bryan Dale Claggett**

2011 IIROC 32

Investment Industry Regulatory Organization of Canada  
Hearing Panel (Pacific District Council)

Decision: May 26, 2011  
(25 paras.)

**Hearing Panel:**

Leon Getz, Q.C., Mark Redcliffe and Douglas Stewart

**Appearances:**

Barbara Lohmann for the Investment Industry Regulatory Organization of Canada  
David Mitchell for Bryan Dale Claggett

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## DECISION ON SANCTIONS

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### INTRODUCTION

¶ 1 Two allegations were made against Mr. Claggett in a Notice of Hearing dated March 15, 2010.

¶ 2 First, it was alleged that he had engaged in discretionary trading without the prior written authorization of his clients. We heard evidence about this matter and, in a decision dated April 4, 2011, concluded that this allegation had not been made out.

¶ 3 The second allegation was that Mr. Claggett had paid \$14,000 to his client WB in an attempt to settle WB's complaint, without the prior knowledge and approval of his employer, BMO, and that he thereby engaged in conduct unbecoming and detrimental to the public interest, contrary to By-law 29.1 (now Dealer Member Rule 29.1).

¶ 4 Mr. Claggett admitted the truth of this allegation. This decision accordingly concerns the appropriate sanction for the admitted violation.

¶ 5 In paragraphs [38] to [40] of our earlier decision we described the background to the admitted payment:

[38] Mr. Claggett's explanation for the payment to WB is set out in the following extract from a facsimile that he sent to BMO on January 15, 2008, after he had been terminated.

During the period of the FMF fiasco in the Fall of 2005, I was very upset and

vocal about it at BMONB for what I thought was a truly deplorable job as lead Underwriter. I felt that their due diligence was awful as the stock plunged to near zero six months after listing. I thought they should have stood up, shown some leadership and taken responsibility and in some way compensate everyone involved in the deal as a result of their shoddy work. To date nothing has been done at BMONB.

[WB] was extremely upset at the melt down of FMF as was everyone else who owned the stock. He harangued me relentlessly on the matter; however, I finally gave in to get him off my back and reimbursed him as he said.

[39] On March 25, 2008 BMO agreed to pay WB some \$57,000 to resolve the concerns that he had expressed and sent him a letter advising him of this. The letter is quite unclear as to the reason for this decision but the amount was predicated in part upon the payment that WB had received from Mr. Claggett.

[40] In November 2010 BMO entered into a settlement agreement with the Ontario Securities Commission in which it acknowledged that “certain aspects of Its conduct [in relation to the FMF offering] were not consistent with reasonable underwriting practices. BMO was also a named defendant in a class action arising out of the FMF financing. The action was settled. It is not known whether WB was entitled to any payments from BMO pursuant to its agreement with the Ontario Securities Commission or out of the funds set aside to settle the class action.

#### THE JOINT SUBMISSION

¶ 6 IIROC and Mr. Claggett have made a joint written submission to the effect that the appropriate sanction in the circumstances is a fine of \$10,000.

¶ 7 For the reasons set out below we agree with the joint submission and accordingly impose upon Mr. Claggett a fine of \$10,000. We make no order about costs.

¶ 8 There is an abundance of authority, followed both by the courts and by administrative tribunals, that a decision-maker must give serious consideration to a joint submission suggesting a recommended sanction unless it is unfit or unreasonable. Such joint submissions should not be departed from in the absence of good and cogent reasons for doing so.

¶ 9 In *Rault v. Law Society of Saskatchewan*, 2009 SKCA 81 (CanLII) the Saskatchewan Court of Appeal quoted with approval from the 1996 decision of the Law Society of Upper Canada in the case of *Orzech*. In that case a joint submission was accepted by the Discipline Committee of the Law Society of Upper Canada despite the fact that it considered that a more serious sanction than that proposed was warranted. The Discipline Committee explained:

... joint submissions concerning penalty should not lightly be disregarded by the Committee, particularly when they are the outcome of an extended period of discussions and negotiations through the pre-hearing conference process. Where joint submissions concerning penalty are wholly inappropriate having regard to the nature of the conduct involved then such joint submissions can and should be disregarded; however, when the joint submissions are not inappropriate and when they are responsive both to the type of conduct established and the particular circumstances of the Solicitor, it is the Committee’s view that only in rare circumstances and with considerable caution should the Committee disregard such joint submissions concerning penalty.

¶ 10 Not surprisingly, a similar policy prevails, for similar reasons, in relation to the approval of a settlement agreement. As it was put in *re Re Milewski*, [1999] I.D.A.C. No. 17, August 5, 1999 at page 11.

A District Council considering a settlement agreement will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact

that the parties have agreed. It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness.

## CONSIDERATIONS RELEVANT TO SANCTIONS IN THIS CASE

### (a) *General considerations*

¶ 11 The range of permissible sanctions is broad, ranging from a reprimand to a substantial financial penalty, suspension for a period or “expulsion” from the industry. The aptness of any particular sanction or combination of sanctions depends on the circumstances.

¶ 12 IIROC has for some years had in place certain “Disciplinary Sanctions Guidelines” (the “Guidelines”). These are divided into two parts: the first deals with general principles that the Organization considers should inform the sanctioning decision; the second sets out its views concerning the considerations that may be relevant to the imposition of sanctions for specified breaches of its Bylaws and Rules.

¶ 13 The general principles set out in the first part of the Guidelines include among others the following general observations:

#### **1. Disciplinary Sanctions Are Remedial In Nature**

As set out in *Re Derivative Services Inc.*, [2000] I.D.A.C.D. No.26, at page 3, a District Council's main concerns in determining an appropriate penalty are:

1. Protection of the investing public;
2. Protection of the Investment Industry Regulatory Organization’s membership;
3. Protection of the integrity of Investment Industry Regulatory Organization’s process;
4. Protection of the integrity of the securities markets, and
5. Prevention of a repetition of conduct of the type under consideration.

The penalty imposed in a specific proceeding should reflect the District Council's assessment of the measures necessary in the specific case to accomplish these goals, ranging from a reprimand to an absolute bar, and may take into account the seriousness of the respondent's conduct and specific and general deterrence.

#### **2. Disciplinary Sanctions As Deterrence**

Registrants and Member firms have significant responsibilities that they must meet if investors are to be protected and market integrity maintained. Registrants who choose to act in ways that threaten the integrity of the capital markets must have the expectation that they will be held accountable through enforcement action by regulators. Sanctions should be based on the circumstances of the particular misconduct by a respondent with an aim at general deterrence.

General deterrence will follow from an appropriate decision and deter others from engaging in similar misconduct and improve overall business standards in the securities industry. This can be achieved if a sanction strikes an appropriate balance by addressing a registrant’s specific misconduct, but also being in line with industry expectations. As was observed by the Ontario District Council in *Re Mills*, [2001] I.D.A.C.D. No. 7, April 17, 2001, at p. 3:

Industry expectations and understandings are particularly relevant to general deterrence. If a penalty is less than industry understandings would lead its Members to expect for the conduct under consideration, it **may** undermine the goals of the Association's disciplinary process; similarly, excessive penalties may reduce respect for the process and concomitantly diminish its deterrent effect. Thus the responsibility of the District Council in a penalty hearing is to determine a penalty appropriate to the conduct and respondent before it, reflecting that its

primary purpose is prevention rather than punishment.

*“Key considerations”*

¶ 14 The Guidelines contain a non-exhaustive illustrative list of factors, described as “key considerations” that a panel should consider in deciding on appropriate sanctions, noting that “since sanctions should be tailored to address the misconduct involved in a particular case, a penalty must be proportionate to the gravity of the misconduct and the relative degree of responsibility of a respondent.” The list refers to 14 such key considerations. It includes such matters as harm to clients, employer and/or the securities market; blameworthiness; degree of participation; whether the respondent was personally enriched, whether the client suffered significant economic loss, whether he accepted responsibility for his misconduct and his prior disciplinary record. Each of the considerations will not be relevant in every case.

¶ 15 In coming to our conclusion we have considered the following factors identified in IIFROC’s list of “key considerations” that seem relevant:

- (a) WB cannot be said to have suffered any harm having been reimbursed in full for his FMF losses.
- (b) there has been no suggestion that Mr. Claggett profited from the reimbursement transaction
- (c) WB was not coerced into accepting the payment from Mr. Claggett – indeed, if there was any “coercion” it seems to have emanated from WB.
- (d) Mr. Claggett’s payment to WB was surreptitious, in the sense that it was made without the knowledge or agreement of his employer and was originally undertaken on the basis that it was to be a “private matter”.
- (e) once his employer became aware of the payment, Mr. Claggett made no attempt to conceal the fact or otherwise dissemble about his involvement in the matter and when IIROC became involved, he was quick to acknowledge his misconduct.
- (f) although Mr. Claggett has previously been sanctioned, this happened 20 years ago in circumstances having no similarity to the present facts.

*IIROC’s “general considerations”*

¶ 16 Of the five “main concerns” identified in *Re Derivative Services Inc.* as relevant to the determination of an appropriate sanction<sup>1</sup> only three - “protection of the investing public”, “protection of the integrity of the securities markets”, and “prevention of a repetition of [similar] conduct” - seem to have any possible bearing on the circumstances of this case. The difficulty with formulations like these, however, is that they are expressed at such a high level of generality that they could mean anything, or nothing.

¶ 17 In some circumstances, no doubt, the sort of misconduct that Mr. Claggett has acknowledged might engage each of the concerns referred to. It could impair the integrity of the securities markets or undermine the protection of the investing public. As the Joint Submission fairly points out, however:

There is no suggestion that the losses were incurred by improper trading in the account, by un suitable investments, or by any fault on Mr. Claggett's part. Payments such as that by Mr. Claggett are prohibited because, in most cases . . . the payments are made to clients to assist the investment advisor to cover up incompetence, negligence, or unauthorised trading. Such is not the case here.

¶ 18 Illustrations of “cover-ups” may be found in cases such as *Toban* [2005] I.D.A.C.D. No. 28 (unauthorized trading), and in *Xiao* [2004 I.D.A.C.D. No. 38 and *Wong* [2005] I.D.A.C.D. No. 26 (negligence or incompetence).

¶ 19 The Guidelines deal specifically with settling a client’s claim for compensation as an illustration of conduct unbecoming and detrimental to the public interest and hence a breach of Dealer Member Rule 29.1.

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<sup>1</sup> See above, paragraph [11].

The general reason for doing so is explained as follows:

A client who has a complaint regarding the activities of a registrant is entitled to a fair and unbiased determination as to the validity of that complaint. If the client's complaint is well-founded, he is entitled to present same to civil dispute resolution channels and the Dealer Member firm for compensation; and to the appropriate regulatory bodies to consider possible disciplinary action. A registrant who attempts to, or does, settle a client claim deprives his client of these options, and prefers his interest over that of his client.

¶ 20 We agree with the policy expressed in this passage. We do not wish to say anything that could be construed as condoning a breach of the kind involved here. Nor do we wish to qualify in any way our view that such conduct is unbecoming and detrimental to the public interest. On the facts of this case, however, the underlying policy is not itself particularly useful as a guide to an appropriate sanction.

¶ 21 The Guidelines suggest that in the absence of any unusual circumstances, the minimum sanction for a disciplinary breach in a case of this kind is a \$10,000 fine. That is what is proposed in the Joint Submission. We have referred above in paragraph [13] to the principal elements that we have taken into account in concluding that that is appropriate. None of them, in our view, either individually or collectively, constitute “unusual circumstances” justifying a sanction greater than the minimum.

¶ 22 There is one other point. The circumstances identified in paragraph [13] also suggest, in our view, that the minimum sanction is adequate to satisfy any requirements to deter Mr. Claggett, specifically, from engaging in similar conduct in the future.

#### *Costs*

¶ 23 IIROC and Mr. Claggett have agreed that no order for costs should be made. We are aware of nothing that suggests that such an agreement is inappropriate, and we approve of it.

#### *Summary*

¶ 24 In summary, pursuant to Dealer Member Rule 20.33 (2) (b) we order that Mr. Claggett pay IIROC a fine of \$10,000.

¶ 25 We found discussion and analysis contained in the Joint Submission very useful and are indebted to counsel for the efforts in this regard.

May 26<sup>th</sup>, 2011

Leon Getz, Chair

Mark Redcliffe

Douglas Stewart

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