



## High Court Won't Hear Madoff Trustee's \$2B Clawback Appeal

By Ben Conarck

Law360, New York (June 22, 2015, 11:59 AM ET) -- The U.S. Supreme Court on Monday declined to hear an appeal from the trustee for Bernie Madoff's collapsed investment firm over a Second Circuit ruling that barred the recovery of nearly \$2 billion under the bankruptcy code's safe harbor provision.

In typical fashion, the high court did not offer an explanation for why it chose to turn down the bid by the liquidation trustee for the bankruptcy estate of Bernard L. Madoff Investment Securities LLC and BakerHostetler partner Irving H. Picard, who had hoped for a review of whether Section 546(e) of the Bankruptcy Code, which can protect certain transfers made by a debtor in connection to securities trading, was properly applied.

Rich Levy, counsel for the customers affected by the suit, said in a statement they were gratified that the Supreme Court decided not to review "the unanimous ruling of the Second Circuit."

"This means that former Madoff Securities customers named as defendants by trustee Picard, but who dealt with the broker under standard brokerage contracts and who knew nothing of their broker's conduct, are protected from having to give back any account withdrawals made more than two years before the collapse of the brokerage firm," Levy said. "We estimate that this covers an aggregate of more than \$1.8 billion in transfers that the Second Circuit ruled to be beyond the reach of the Trustee."

Picard's spokeswoman, Amanda Remus, told Law360 in a statement on Monday that the trustee and his counsel "are aware of and respect the decision of the Supreme Court."

"Approximately \$5 billion of potential recoveries still remain and the [Securities Investor Protection Act] trustee and his counsel continue to pursue these amounts in the bankruptcy court," Remus said.

Picard has argued that the safe harbor provision, also known as the "stockbroker defense," was wrongfully applied by the Second Circuit because no actual securities trading took place in connection with Madoff's historic Ponzi scheme. All Madoff was doing was dumping money into an account that was used to cover customer withdrawals, the trustee said.

A New York federal judge threw out Picard's attempts to claw back the money from customers he called "net winners" of the Madoff scheme in 2012 on the grounds that Section 546(e) still applied because the customers were under the impression real securities transactions were taking place.

In December, a Second Circuit panel upheld the district court's ruling, saying the customers' arrangements with Madoff's firm were indeed securities contracts under the broadly written statute and thus protected.

The Second Circuit's ruling has profound repercussions that threaten to gut the role of trustees liquidating estates under the U.S. Securities Investor Protection Act, Picard argued in his petition to the high court.

"The statute can only function if funds are restored for a pro rata distribution to the broker's customers," the petition said. "The SIPA trustee's clawback power is therefore essential because insolvent brokers may dispose of large sums before the proceedings begin — for example, through the distribution of fictitious profits."

He also argued that the stockbroker defense is only supposed to be a narrow exception, enacted to prevent instability in open securities markets, but the Second Circuit's ruling actually gave legal effect to Madoff's fraud.

The customers have previously argued that the court decision was not designed to ratify a fraud, simply to protect the transfers.

Madoff pled guilty in 2008 to federal felony charges connected to the orchestration of what is believed to be the largest Ponzi scheme in U.S. history, a \$65 billion fraud that lasted for years.

In 2009 he was sentenced to 150 years in prison.

Picard is represented in the U.S. Supreme Court case by Thomas C. Goldstein and Tejinder Singh of Goldstein & Russell PC and David J. Sheehan, Tracy L. Cole, Thomas D. Warren and Seanna R. Brown of BakerHostetler.

Counsel for the customers in the U.S. Supreme Court was not immediately available on Monday. They were represented at the Second Circuit by Helen Davis Chaitman of Becker & Poliakoff, Richard Levy of Pryor Cashman LLP and P. Gregory Schwed of Loeb & Loeb LLP.

The case is *Picard v. Ida Fishman Revocable Trust et al.*, case number 14-1129, in the U.S. Supreme Court.

--Additional reporting by Matt Chiappardi. Editing by Rebecca Flanagan.