



## [Supreme Court declines Madoff trustee, SIPC appeals](#)

By [Kirk O'Neil](#) Updated 07:15 PM, Jun-22-2015 ET

The Supreme Court has rejected appeals from the trustee liquidating [Bernard L. Madoff Investment Securities LLC](#) and the [Securities Investor Protection Corp.](#), which will prevent Madoff's Ponzi scheme victims from clawing back up to \$4 billion in claims.

"We're disappointed," said Josephine Wang, general counsel for the non-profit Securities Investor Protection Corp. "We were hoping for a different result."

The Supreme Court on Monday declined to hear arguments related to separate petitions filed by the trustee [Irving H. Picard](#) and SIPC on March 17, asking the court to overturn a December 2014 ruling by the 2nd Circuit Court of Appeals that barred the trustee from recovering alleged fictitious profits from Madoff customers paid more than two years before the firm collapsed. The 2nd Circuit said the profits were protected under the safe harbor defense of Section 546(e) of the Bankruptcy Code.

"We are gratified that the Supreme Court today decided not to review the unanimous ruling of the 2nd Circuit," [Richard Levy Jr.](#) of [Pryor Cashman LLP](#), who represented the customers, said in a statement. "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.

"We estimate that this covers an aggregate of more than \$1.8 billion in transfers that the 2nd Circuit ruled to be beyond the reach of the trustee," Levy said.

The 2nd Circuit on Dec. 8 had agreed with a ruling by the U.S. District Court for the Southern District of New York that said account opening documents were master agreements and the payments of the alleged fictitious profits were settlement payments on alleged non-existent trades. It found that account opening documents were securities contracts protected under Section 546(e). The district court had entered its ruling May 15, 2012.

Section 546(e) provides a safe harbor for transfers by a stockbroker that are settlement payments or made in connection with a securities contract.

"Customers in the Madoff Ponzi scheme who were paid fictitious profits get to keep them," Wang said.

This predicament can continue into the future, Wang said, until another circuit court rules differently and there's another Supreme Court challenge.

"We have to hope another circuit sees it a different way," Wang said.

Picard and SIPC asked the Supreme Court in their writs of certiorari whether the so-called stockbroker defense under Section 546(e) applies to payments that involve fictitious securities transactions. They also

asked whether the use of the stockholder defense for payments involving fictitious securities transactions is barred as inconsistent with the Securities Investor Protection Act.

Picard's writ claims the 2nd Circuit wrongfully concluded that account opening documents were security agreements. The writ defines a security agreement as one that secures a specific financial market transaction, but claims there were no such transactions in the Ponzi scheme.

The writ referred to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which defined a security contract as a contract for the purchase, sale or loan of a security, such as mortgage loans, certificates of deposit or certain options. It said [Congress](#) did not change the text to expand the subsection to encompass account opening documents or other authority agreements.

Picard has reached deals to recover about \$10.64 billion for victims of the BLMIS Ponzi scheme and doled out more than \$7.2 billion to those clients. The trustee will be seeking to recover another \$5 billion for Madoff victims, despite being denied up to \$4 billion in recoveries, according to trustee spokeswoman Amanda Remus.

The potential \$5 billion in additional funds would come from transactions in the two years prior to BLMIS entering Securities Investor Protection Act receivership on Dec. 15, 2008.

Judge Stuart Bernstein of the [U.S. Bankruptcy Court for the Southern District of New York](#) in Manhattan June 2 ruled Picard could claw back money from certain former customers. These "net winners" withdrew more than they deposited into BLMIS, and Picard wants to recover these "fictitious profits" in the Ponzi scheme.

The funds are limited to intentional fraudulent transfers made in the two years before BLMIS's Dec. 15, 2008, SIPA receivership. Proceedings in the case take place in bankruptcy court.

The defendants in 233 adversary proceedings had sought to have complaints filed by Picard dismissed.

Bernstein, however, ruled, "Fictitious profits are not profits at all but distributions of other people's money based on an arbitrary allocation of fraudulent bookkeeping entries."

He later added, "Once it is determined that a Ponzi scheme exists, all transfers made in furtherance of that Ponzi scheme are presumed to have been made with fraudulent intent."

Picard, a [Baker & Hostetler LLP](#) partner, on April 15 sought permission to make a sixth pro rata interim distribution from the customer fund to clients with allowed claims. A hearing on the latest payout has been adjourned until July 29.

The Securities Investor Protection Corp., which maintains a special reserve fund authorized by Congress to help investors at failed brokerage firms, announced on Dec. 15, 2008, that it was liquidating BLMIS under the SIPA. The case started in the U.S. District Court for the Southern District of New York in Manhattan before it was transferred to bankruptcy court as an adversary proceeding.

Madoff on March 29, 2009, pleaded guilty to 11 felony charges, including securities fraud, mail fraud, wire fraud, investment adviser fraud and money laundering, among others. U.S. District Court Judge Dennis Chin on June 29, 2009, sentenced Madoff to 150 years in prison.

David J. Sheehan, Oren J. Washavsky, Geoffrey A. North, Tatiana Markel and Dominic Gentile at Baker & Hostetler are counsel to Picard.