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Madoff and the Net Investment Method; Equity Goes Where the Law Fears to Tread

BY PETER A. ZISSER*

The man who is admired for the ingenuity of his larceny is almost always rediscovering some earlier form of fraud. The basic forms are all known, have all been practiced. The manners of capitalism improve. The morals may not.[1]

Introduction

We are all no doubt familiar with the unparalleled Ponzi scheme orchestrated by Bernie Madoff (''Madoff''). Billions of dollars were invested and billions of dollars were paid out. Investors deposited funds with Madoff's ''trading'' company, Bernard L. Madoff Investment Securities LLC (''BLMIS''). Unfortunately, BLMIS never invested those customer funds. Instead, it generated fictitious paper accounts and trading statements, all of which consistently showed profitable trades and continuing gains. In the classic Ponzi tradition, the scheme collapsed when new investments were insufficient to support the payments required on the earlier allegedly invested funds. The final customer statements issued by BLMIS falsely recorded nearly $64.8 billion of net investments and related fictitious gains. Once the fraud was discovered, the Securities & Exchange Commission commenced a suit against BMLIS in the District Court for the Southern District of New York under the Securities Investor Protection Act (''SIPA''). That suit was subsequently referred to the bankruptcy court for the Southern District of New York. Irving H. Picard was appointed as the SIPA trustee (the ''trustee'') to oversee the liquidation of BLMIS. The trustee's overarching task was to recover and collect assets that could be used to satisfy the claims of BLMIS' customers.

In order to accomplish this task, the trustee had to determine the appropriate method of computing the amount of each customer's claim. There were two major schools of thought: (i) the trustee's view that because BLMIS' books and records were complete fabrications, the only way to determine each customer's claims was to subtract the funds paid out to each customer from the funds invested by that customer (the ''Net Investment Method''); and (ii) the contrary view that BLMIS' final customer statements reflected each customer's ''legitimate expectations'', and thus should be used to determine their claims (the ''Last Statement Method''). Both the U.S. Bankruptcy Court for the Southern District of New York (the ''bankruptcy court'') and the Second Circuit Court of Appeals (the ''Second Circuit'') came down on the side of the trustee.

It is clear only the Net Investment Method is rooted in the real world, but as approved by the bankruptcy court and the Second Circuit, it is legally flawed. The Net Investment Method approved by the Courts has no timing element with respect to when deposits and payments were made. In other words, *all* of a customer's deposits and withdrawals with BLMIS are netted, regardless of when such funds were paid in or paid out, with the customer's ''claim'' equal to any positive difference. There is nothing in the decisions of either the bankruptcy court or the Second Circuit to suggest that the trustee, in actually applying the Net Investment Method, is bound by any applicable statute of limitations governing fraudulent transfers, nor any cautionary language to alert the reader that the decision is not meant to be taken as affecting any such statutes of limitation.

The author of this article contends, however, that the trustee, in applying the Net Investment Method, is bound by the statute of limitation governing fraudulent transfers contained in the Bankruptcy Code[2] and, as such, should be prohibited from netting any payments

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[2] 11 U.S.C. §§ 101 *et seq.*

to customers done more than a maximum of two years ago against deposits made by a customer less than two years ago. As a result, applying the Net Investment Method as approved, with no time limits, would allow the trustee to (i) exercise a right of setoff under Bankruptcy Code Section 553 and/or (ii) use Bankruptcy Code Section 502(d) as an affirmative defense to permanently disallow claims, where no such rights exist.

The Net Investment Method

By way of background, SIPA provides customers (''Customers'')[3] of brokers and dealers (collectively, ''Brokers'') in the securities market with special protections, including the designation of certain funds of the broker's estate (the ''Customer Funds'') as ''customer property,'' to be used solely for the benefit of the failed Broker's Customers.[4] When the assets of a Broker are liquidated, each Customer shares ratably in those Customer Funds to the extent of the Customer's ''net equity,'' which is determined under SIPA by ''(A) calculating the sum which would have been owed by the debtor to such customer if the debtor had liquidated, by sale or purchase on the filing date, all securities positions of such customer . . . ; minus (B) any indebtedness of such customer to the debtor on the filing date.''[5]

Further, the Securities Investor Protection Corporation (''SIPC'') maintains a security fund for customers. In the event the Customer Funds are insufficient to satisfy all valid ''net equity'' claims, SIPC will advance up to $500,000 per Customer to the SIPA trustee to satisfy those claims. It is the SIPA trustee's responsibility to discharge ''net equity'' claims only ''insofar as such obligations are ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee.''[6]

In the instant case, the trustee determined that each Customer's ''net equity'' should be calculated using the Net Investment Method, whereby each customer's account at BLMIS was credited with the amount of cash deposited, less any amount withdrawn, without regard for when the deposits or the withdrawals were made. This limited the class of Customers to those who put in more money than they took out, again without regard to when they put in or took out the money.[7]

A number of parties (the ''Statement Claimants'') objected, arguing that each Customer's net equity should be calculated using the Last Statement Method, whereby Customers would recover the market value of the securities reflected on the last customer statements received from BLMIS. The bankruptcy court upheld the trustee's use of the Net Investment Method as against the Last Statement Method, finding that the customer statements could not be relied upon to determine net equity because they were entirely fictitious.[8] On August 16, 2011, the Second Circuit upheld the bankruptcy court's ruling that the Net Investment Method chosen by the trustee was the appropriate method of determining each customer's net equity.[9]

In reaching this conclusion, the Second Circuit initially found that the Statement Claimants were indeed ''customers'' pursuant to SIPA and thus entitled to its protections. Treating the BLMIS Claimants as ''customers,'' the Second Circuit held, ''protects their 'legitimate expectations' as investors in the securities market.'' Although the existence of a written confirmation that securities have been purchased on his or her behalf is evidence that an investor should be treated as a customer ''the regulation does not . . . mandate that this 'written confirmation' form the basis for calculating a customer's 'net equity.' ''[10]

The Second Circuit went on to address the Statement Claimants' argument that the only way to protect their ''legitimate expectations'' was by calculating ''net equity'' based on the Last Statement Method. The Second Circuit found that under the circumstances in this case, the language of SIPA did not support that argument. Rather, in determining how to calculate net equity, the trustee must look at (i) the definition of ''net equity'' (liquidated securities positions less indebtedness) and (ii) the trustee must discharge his obligations to the extent they are ascertainable from the debtors books and records. In the instant case, it was entirely proper for the trustee to discharge his obligations by rejecting the Last Statement Method because the debtor's books and records were fraudulently prepared to reflect trading profits in good times and bad, and often on an unequal, arbitrary basis between and among customers. Here, the Net Investment Method was appropriate ''because it relies solely on unmanipulated withdrawals and depos-

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[3] Under SIPA, the term ''customer'' is defined to include:

> (A) [a]n entity with whom a person deals as a principal or agent and that has a claim against such person on account of a security received, acquired, or held by such person in the ordinary course of such person's business as a stockbroker, from or for the securities account of such entity: (i) for safekeeping; (ii) with a view to sale; (iii) to cover a consummated sale; (iv) pursuant to a purchase; (v) as collateral under a security agreement; or (vi) for the purpose of registration of transfer; and (B) [a]n entity that has a claim against a person arising out of: (i) a sale or conversion of a security interest, acquired, or held as specified in subparagraph (A) of this paragraph; or (ii) a deposit of cash, a security, or other property with such person for the purpose of purchasing or selling a security.

11 U.S.C. § 741(2).

[4] 15 U.S.C. § 78lll(4).

[5] 15 U.S.C. § 78lll(11). The Bankruptcy Code defines ''net equity'' as the ''(A)(i) aggregate dollar balance that would remain in such accounts after the liquidation, by sale or purchase, at the time of the filing of the petition, of all securities positions in all such accounts, except any customer name securities on such customer; minus (ii) any claim of the debtor against such customer in such capacity that would have been owing immediately after such liquidation . . . .'' 11 U.S.C. § 741(6).

[6] *See In re Bernard L. Madoff Inv. Sec. LLC*, 424 B.R. 122, 135 (Bankr. S.D.N.Y. 2010) (hereinafter, ''*Madoff*'').

[7] *See, e.g., Memorandum of Law in Support of Trustee's Motion for an Order Upholding Trustee's Determination Denying ''Customer'' Claims for Amounts Listed on Last Customer Statement, Affirming Trustee's Determination of Net Equity, and Expunging Those Objections with Respect to the Determinations Relating to Net Equity*, dated Oct. 16, 2009, at pp. 45-49 [Doc. # 525].

[8] *Id.*

[9] *See In re Bernard L. Madoff Investment Securities LLC*, 2011 U.S. App. LEXIS 16884, at *18 (2d Cir. Aug. 16, 2011)(23 BBLR 999, 8/18/11) (23 BBLR 999, 8/18/11)(''Use of the Last Statement Method in this case would have the absurd effect of treating fictitious and arbitrarily assigned paper profits as real and would give legal effect to Madoff's machinations.'').

[10] *Id.* at *21.

its and refuses to permit Madoff to arbitrarily decide who wins and who loses.''[11]

Under the Net Investment Method, as proposed by the trustee and approved by the bankruptcy court and the Second Circuit, the trustee simply nets deposits and withdrawals. Therefore, a withdrawal done twenty (20) years ago could be set off against a deposit done the day before the bankruptcy, as the following hypothetical example indicates:

> 12/18/96 – Customer invests $1 million with BLMIS. Customer is promised a 15% annual return.[12] No funds are actually invested by BLMIS.
>
> 12/18/06- Customer has not withdrawn any funds for 10 years. Without compounding, Customer's account statement shows a balance of $2.5 million. Customer withdraws the $2.5 million.
>
> 12/17/08 - Customer invests $2.5 million with BLMIS.
>
> 12/18/08 - BLMIS is liquidated under SIPA
>
> **Customer would have a claim for $1 million. This would be the total of investments ($3.5 million) minus the total of payments ($2.5 million).**

Fraudulent Transfers and the Statute of Limitations

There are basically two forms of avoidable fraudulent transfers: (i) transfers done with intent to hinder, delay or defraud the transferor's creditors, without regard to the transferor's financial condition (intentional fraud); and (ii) transfers done for less than reasonably equivalent value while the transferor is insolvent or would be rendered insolvent by the transfer (constructive fraud).[13] The Bankruptcy Code has a two (2) year statute of limitations on avoidance under Bankruptcy Code Section 548.[14] In most, but not all, circumstances, the Bankruptcy Code allows trustees seeking to avoid fraudulent transfers to utilize applicable non-bankruptcy avoidance law.[15] Under New York Law (the applicable non-bankruptcy state law in this case), the statute of limitations for avoidance and recovery of fraudulent transfers made with intent to defraud is the greater of (i) six (6) years from the date the cause of action accrued or (ii) two (2) years from the time the trustee discovered the fraud, or could with reasonable diligence have discovered it.[16]

In this case, however, the trustee is unable to look to New York state law because of the so-called ''safe harbor'' for certain securities transactions provided by Bankruptcy Code Section 546(e).[17] The U.S. District Court for the Southern District of New York has ruled that Section 546(e) applies to fraudulent transfers made by BLMIS.[18] Section 546(e), however, only provides a narrow exception for intentional fraud by allowing the trustee to apply Section 548(a)(1) (with its two-year reach-back) to avoid those transfers. Section 546(e) does not allow the trustee to utilize Section 544 to apply state law.[19]

A hypothetical based on a two-year statute of limitations dating from December 18, 2008 (the ''Petition Date''),[20] indicates the following result:

> 12/1/96 – Customer invests $1 million with BLMIS. Customer is promised a 15% annual return. No funds are actually invested by BLMIS.
>
> 12/1/06- Customer has not withdrawn any funds for 10 years. Without compounding, Customer's account statement shows a balance of $2.5 million. Customer withdraws the $2.5 million.
>
> **12/18/06– Two-Year Statute of Limitations Runs.**
>
> 12/17/08 - Customer invests $2.5 million with BLMIS.
>
> 12/18/08 - BLMIS is liquidated under SIPA
>
> **Customer would have a claim for $2.5 million, the amount of principal invested within the two years.**

Although the effect of the trustee's avoidance powers was argued and briefed before the bankruptcy court by both the trustee and supporters of the Last Statement Method, it was done so only in the context of challenging the Net Investment Method. As a result, the issue of

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[11] *Id.* at *25.

[12] Madoff promised annual returns of between 10% and 17%. *Madoff*, 424 B.R. at 130.

[13] *See* 11 U.S.C. § 548(a)(1)(A), (B). For purposes of this analysis, the author assumes that all allegedly fraudulent transfers made by BLMIS were done with intent to defraud. *See, e.g., Irving H. Picard v. Saul B. Katz et al.*, 2011 U.S. Dist. LEXIS 109595, at * 14 (''Since it is undisputed that Madoff's Ponzi scheme began more than two years before the filing of the bankruptcy petition and continued to almost the very day of filing, it is patent that all of [BLMIS'] transfers during the two-year period were made with actual intent to defraud present and future creditors.'').

[14] *See* 11 U.S.C. § 548(a)(1). This two-year statute of limitations refers to the period prior to the bankruptcy. The Bankruptcy Code also contains a statute of limitations on the time in which the trustee may bring a fraudulent transfer action once he is appointed. *See* 11 U.S.C. § 546(a).

[15] *See* 11 U.S.C. § 544(b)(1) (''[T] trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law . . . .'').

[16] *See* N.Y.C.P.L.R. § 213(8). This is commonly called the ''discovery rule.'' *See Picard v. Chais*, 445 B.R. 206, 232 (Bankr. S.D.N.Y. 2011).

[17] *See* 11 U.S.C. § 546(e). Section 546(e) of the Bankruptcy Code provides, in pertinent part, that:

> [n]otwithstanding sections 544, 545, 547, 548 (a)(1)(B) and 548 (b) of this title, the trustee may not avoid a transfer that is a . . . settlement payment, as defined in section . . . 741 of this title, made by or to (or for the benefit of) a . . . stockbroker . . . or that is a transfer made by or to (or for the benefit of) a . . . stockbroker, in connection with a securities contract, as defined in section 741 (7). . . except under section 548 (a)(1)(A) of this title.

11 U.S.C. § 546(e).

[18] *See Irving H. Picard v. Saul B. Katz et al.*, 2011 U.S. Dist. LEXIS 109595, at **9-1518, n.6 (S.D.N.Y. Sept. 27, 2011) and *Irving H. Picard v. Saul B. Katz et al.*, 2011 U.S. Dist. LEXIS 110540 (S.D.N.Y. Sept. 28, 2011).

[19] The trustee, of course, believes that the district court is in error as to the application of Bankruptcy Code Section 546(e) and has filed a motion with the district court to either direct entry of a final judgment or to certify the question to allow an interlocutory appeal to the Second Circuit. *See Trustee's Memorandum of Law in Support of Motion to Direct Entry of Final Judgment Under Federal Rule of Civil Procedure 54(b) and for Certification Under 28 U.S.C. § 1292(b)*, dated October 7, 2011, Adv. Pro. No. 10-05287 (BRL) [Docket No. 47].

[20] BLMIS did not file for relief under the Bankruptcy Code. December 18, 2008 is the date the SEC commenced suit against BLMIS. For all bankruptcy related purposes, that date is considered the ''petition date.'' *See Madoff* at 124 n.3.

whether the trustee's Net Investment Method would respect the applicable statutes of limitations was subsumed within the larger issue of determining the more appropriate method of computing Customer claims, and therefore never directly addressed by either the bankruptcy court or the Second Circuit.

The Right of Setoff

One of the required structural underpinnings of Net Investment Method is the concept of setoff. In essence, the trustee is going to set off the amount he owes you against the amount you ostensibly owe him and only allow you the net, if positive. Under Bankruptcy Code Section 553, a creditor may exercise its right of setoff against the debtor to the extent the right exists under non-bankruptcy law. Setoff requires that: (a)(i) the creditor hold a claim against the debtor and (ii) the debtor hold a claim against the creditor, both of which arose prior to the petition date, (b) the claim and debt must be mutual (*i.e.*, between the same parties in the same capacity), and (c) the claim and debt are both valid and enforceable.[21]

Under New York law, however, where the statute of limitations has run on a debt, as arguably is the case with any amounts paid out more than two (2) years prior to the Petition Date, that debt is no longer valid and cannot be used to offset a mutual claim.[22]

The Use of Bankruptcy Code Section 502(d)

The trustee may also be looking at Bankruptcy Code Section 502(d) for support for the Net Investment Method. Section 502(d) is another Bankruptcy Code tool meant to ensure a fair distribution to all creditors, by giving a trustee the authority to disallow the claim of any creditor that may have received an avoidable transfer, but who refuses to return that transfer.[23]

There is, however, a split of authority as to the effect of statutes of limitation on enforcement of Section 502(d). In a number of jurisdictions, courts have taken a strict view of Section 502(d), holding that it cannot be raised to disallow a claim unless a judgment against the transferee/creditor has already been obtained.[24] As a result, if the trustee is barred by the statute of limitations from bringing an avoidance action, he is also barred from using Section 502(d) to disallow the transferee/creditor's claim.

In other jurisdictions (or even within the same jurisdiction, such as the Southern District of New York), even if no judgment against the transferee/creditor was ever obtained or can never be obtained because of the running of the statute of limitations, the trustee nevertheless is permitted to raise Section 502(d) as a defense to the claim, but is barred from obtaining any affirmative recovery from the transferee/creditor.[25] The allowance of the transferee/creditor's claim in these cases, however, can only be temporarily suspended pending an actual adjudication of the alleged fraudulent transfer, albeit in the context of the claims objection process.[26] The transferee/creditor retains the right to raise the statute of limitations as a defense. Until that time, the transferee/creditor's claim remains ''disputed'', requiring the trustee either to reserve 100% of the held-back distribution or to seek estimation.[27] Thus, assuming the Customer has a valid statute of limitations argument, the only thing the trustee can do under Bankruptcy Code Section 502(d) is temporarily delay distribution, not deny distribution. In the absence of any other considerations, in the instant case, the result should be as follows:

12/1/96 – Customer invests $1 million with BLMIS. Customer is promised a 15% annual return. No funds are actually invested by BLMIS.

12/1/06- Customer has not withdrawn any funds for 10 years. Without compounding, Customer's account

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[21] *See* 11 U.S.C. § 553; *In re Hudson*, 345 B.R. 477, 482 (Bankr. N.D.N.Y. 2006) (quoting *Collier on Bankruptcy* § 553.01 [1] p. 553-7 (15th ed. Rev. 2005).

[22] *See United States v. Irving Trust Co. (In re Clayton Magazines, Inc.)*, 77 F.2d 852, 853 (2d Cir. 1935) (''The allowance of a set-off does not alter the underlying legal relations between the parties, for one against whom a set-off is claimed must still be under the legal obligation to pay the amount of the set-off to the claimant.''); *see also, e.g., Gober v. Terra + Corp. (In re Gober)*, 100 F.3d 1195, 1208 (5th Cir. 1996) (''Counterclaims for setoff . . . are subject to the applicable statute of limitations just as if they were asserted as independent actions.''); *Gibson v. U.S. (In re Gibson)*, 176 B.R. 910, 917 (Bankr. D. Or. 1994) (''Setoff is in the nature of an affirmative action as it arises out of a transaction or occurrence separate from that out of which the plaintiff's claim arose. It is subject to any applicable statute of limitations.''); *accord In re Rodriguez*, 387 B.R. 76 (Bankr. E.D.N.Y. 2008); *Hudson*, *supra* note 13.

[23] Bankruptcy Code Section 502(d) provides, in pertinent part, that ''the court shall disallow any claim of any entity from which property is recoverable under section [550] of this title or that is a transferee of a transfer avoidable under section [548 or 544] of this title, unless such entity or transferee has paid the amount, or turned over any such property . . . 11 U.S.C. § 502(d).

[24] *See, e.g., Holloway v. Internal Revenue Svc. (In re Odom Antennas, Inc.)*, 340 F.3d 705, 708 (8th Cir. 2003); *In re Midwest Agri Dev. Corp.*, 387 B.R. 580, 586 (B.A.P. 8th Cir. 2008); *In re Eric Gordon Jensen*, 2010 Bankr. LEXIS 231 (Bankr. S.D.N.Y. Feb. 3. 2010);*Official Committee of Unsecured Creditors of Broadstripe, LLC v. Highland Capital Mgmt., L.P. (In re Broadstripe, LLC)*, 144 B.R. 51 (Bankr. D. Del. 2010);); *State Bank and Trust v. Spaeth (In re Motorwerks Inc.)*, 371 B.R. 281, 296 (Bankr. S.D. Ohio 2007); *In re Asia Global Crossing, Ltd.*, 344 B.R. 247, 255-56 (Bankr. S.D.N.Y. 2006; *Logan v. Credit General Ins. Co. (In re PRS Ins. Group, Inc.)*, 331 B.R. 580, 587 (Bankr. D. Del. 2005) (citing *Holloway v. IRS*); *Cohen v. TIC Fin'l Sys. (In re Ampace Corp.)*, 279 B.R 145, 163 (Bankr. D. Del. 2002); *In re Lids*, 260 B.R. 680 (Bankr. D. Del. 2001); *In re Mktg. Assocs. of America, Inc.*, 122 B.R. 367 (E.D. Mich. 1991); *see also Seta Corp. of Boca, Inc. v. Atlantic Computer Sys. (In re Atlantic Computer Sys.)*, 173 B.R. 858, 862 (Bankr. S.D.N.Y. 1994).

[25] *See, e.g., In re America West Airlines, Inc.*, 217 F.3d 1161 (9th Cir. Ariz. 2000); *Buchwald Capital Advisors LLC v. JP Morgan Chase Bank, N.A. (In re Fabrikant & Sons, Inc.)*, 2009 Bankr. LEXIS 3606 (Bankr. S.D.N.Y. Nov. 10, 2009); *In re Midwest Agri. Dev. Corp.*, 2007 Bankr. LEXIS 4487 (Bankr. D. N.D. Nov. 1, 2007); *Benninger v. First Colony Life Ins. Co. et al.*, 357 B.R. 337, 359 (Bankr. W.D. Penn. 2006); *Enron Corp. v. Int'l Fin. Corp.* (*In re Enron Corp.)*, 343 B.R. 75 (Bankr. S.D.N.Y. 2006); *In re Enron Corp.*, 340 B.R. 180 (Bankr. S.D.N.Y. 2006); *In re Loewen Group Int'l, Inc.*, 292 B.R. 522, 526 (Bankr. D. Del. 2003); *In re McLean Indus., Inc.*, 196 B.R. 670, 673 (S.D.N.Y. 1996).

[26] *See In re Enron Corp.*, 340 B.R. at 192.

[27] *See* 11 U.S.C. § 502(c).

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statement shows a balance of $2.5 million. Customer withdraws the $2.5 million.

12/18/06– Two-Year Statute of Limitations Runs.

12/17/08 - Customer invests $2.5 million with BLMIS.

12/18/08 - BLMIS is liquidated under SIPA

Customer has a claim of no less than $2.5 million. Trustee can seek to temporarily disallow this claim under Section 502(d), but cannot condition payment on Customer returning the $1.5 million ($2.5 million transfer less $1 million investment of principal).[28]

Analysis

Application of the above should mean that the trustee, just as every other bankruptcy trustee or debtor in possession, should be prohibited from (i) avoiding and recovering fraudulent transfers made beyond the two-year statute of limitations, (ii) setting off a fraudulent transfer that was made beyond the two-year statute of limitations against a current claim by a Customer, and using Section 502(d) to permanently disallow a claim by a creditor/Customer based on a fraudulent transfer that was made beyond the two-year statute of limitations.

It should be noted that in holding that the Net Investment Method was the more appropriate method for determining Customer claims, the Second Circuit made it clear that its decision in the *Madoff* case was not to be taken as limiting the manner in which net equity was to be calculated under SIPA.[29] Thus, the trustee was under no obligation to create a Net Investment Method that violated the law, even when doing equity. Taking all of the above into consideration, the result *might* have been as follows:

12/1/96 – Customer invests $1 million with BLMIS. Customer is promised a 15% annual return. No funds are actually invested by BLMIS.

12/1/06- Customer has not withdrawn any funds for 10 years. Without compounding, Customer's account statement shows a balance of $2.5 million. Customer withdraws the $2.5 million.

12/18/06– Two-Year Statute of Limitations Runs.

12/17/08 - Customer invests $2.5 million with BLMIS.

12/18/08 - BLMIS is liquidated under SIPA

Customer has a claim of no less than $2.5 million.

Conclusion

While the Second Circuit's decision may allow for other methods of calculating net equity, including methods that may take into account applicable statutes of limitations, the method actually approved does not. Further, the decision contains no cautionary language to the effect that it is not meant to abolish or in any way affect the Bankruptcy Code's two-year statute of limitations. The author of this article acknowledges that the BLMIS's case is proceeding along at least two separate tracks: (i) claims adjudication; and (ii) avoiding and recovering alleged fraudulent transfers. As a result, at some point or points in this case, the two tracks will merge, hopefully with the trustee computing Customers' net equity in compliance with the statutes of limitations. Nevertheless, the concern remains that the next SIPA trustee in a Ponzi or similar scheme (and we know there will be one) may decide not to comply with the statutes of limitation in determining customer claims, relying on this decision in the Second Circuit.

The author of this article does not mean to suggest that the Net Investment Method, with either a two-year or six-year statute of limitations, will always be both fair and equitable. Those Customers who have been customers of BLMIS the longest will argue for the two-year limitation; those who more recently became Customers will argue for the six-year limitation, with the hope that the trustee will be able to recover more funds to distribute.

Whatever the result, however, it is a creature of SIPA and the Bankruptcy Code and can only be changed by Congress.

[28] In some cases, returning a fraudulent transfer even absent the commencement of an adversary proceeding may be in the transferee's best interests. Nevertheless, a discussion of this issue is beyond the scope of this article. For an analysis of the economic ramifications under Bankruptcy Code Section 502(d), the author of this article respectfully refers the reader to Peter Zisser, *Does Your Dog Bite? Asking the Right Questions in Actions Under Section 502(d)*, Bankruptcy Law Reporter, Vol. 20, No. 41, 1505-1507 (BNA October 22, 2009)(21 BBLR 1505, 10/22/09).

[29] *See In re Bernard L. Madoff Investment Securities LLC*, 2011 U.S. App. LEXIS 16884, at *25, n.8. (''We conclude that the statutory language does not prescribe a single means of calculating 'net equity' that applies in the myriad circumstances that may arise in a SIPA liquidation.'').