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# Madoff, WaMu, Lehman, Inspirada, Point Blank: Bankruptcy

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By *Bill Rochelle*

(This report contains items about companies both in bankruptcy and not in bankruptcy. Adds Washington Mutual, Lehman, Inspirada, Friendly, Point Blank, Alexander Gallo and Capmark in Updates.)

Oct. 7 (Bloomberg) -- Suits the trustee for Bernard L. Madoff Investment Securities LLC filed against hundreds of customers to recover fictitious profits could all be dismissed if a customer named James Greiff succeeds with a motion filed on Oct. 5 to dismiss the lawsuit now before U.S. District Judge Jed Rakoff in Manhattan.

Rakoff took the suit out of bankruptcy court to decide two issues: Do the profits shown on account statements represent valid debt to counter a fraudulent transfer claim? Second, Rakoff told Greiff and the Madoff trustee to explain whether a provision in bankruptcy law known as the safe harbor bars suits because they stem from trades in securities.

Rakoff already answered the second question when he ruled last month in a separate suit involving Fred Wilpon and the owners of the New York Mets that the safe harbor precludes the trustee from recovering any payments more than two years before bankruptcy.

On the first issue, Greiff's lawyer, Helen Davis Chaitman, argues in her brief that the Madoff firm "was not a Ponzi scheme." She says it was "a legitimate trading business which operated a fraudulent investment business on the side to fund the trading operation." Consequently, she contends the trustee isn't entitled to the presumption that the Madoff firm was a Ponzi scheme and that payments it made to customers were fraudulent.

Chaitman argues that the trustee has no right to sue because money paid to customers didn't belong to the Madoff firm in the first place. She says that the money was stolen from other customers and under law was held in trust. Consequently, it was trust funds the customers received, not Madoff firm property the trustee is entitled to recover.

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Greiff's lawyer makes another technical argument when she says that only equity investors in Ponzi schemes can be compelled to pay back fictitious profits. She says that payments by a Ponzi on account of legitimate debt can't be recovered in bankruptcy.

Securities and state law both give customers the right to property listed in their account statements, Chaitman argued. Consequently, she believes customers can't be sued for receiving fraudulent payments when they were only receiving money to which they were entitled.

If Rakoff rules that customers are required to give back fictitious profits received within two years of bankruptcy, Chaitman argues that any deposits customers made into their accounts in the last two years should be offset against anything they're required to give back. In that respect, she points to part of the Wilpon decision in September where Rakoff said it was undecided how to calculate how much a customer might be required to pay back.

In last month's decision, Rakoff ruled that the trustee can only seek to recover fictitious profits going back two years. Unless the Wilpon decision is reversed on appeal, it means that the trustee's recovery from Greiff and other so-called innocent customers can't go back six years as the trustee is seeking in his complaints.

Although he didn't decide the issue in the Wilpon case, Rakoff wrote a footnote in his opinion saying the trustee "might well prevail on summary judgment seeking recovery of the profits." As a result, the trustee, when he files papers on Oct. 26, might ask for judgment against Greiff for profits taken out in two years. For details on the Wilpon opinion, click here for the Sept. 28 Bloomberg bankruptcy report.

The trustee filed suit yesterday to recover \$229 million from financial institutions who invested with Madoff through offshore feeder funds.

The trustee's lawsuits include \$110 million sought from KBC Investments Ltd., \$50.1 million from Caceis Bank Luxembourg, \$21.5 million from Nomura International Plc, and \$25.5 from ABN Amro Bank NV.

The trustee alleges the moneys were invested in the Madoff firm and taken out through feeder funds such as Fairfield Sentry Ltd. and Harley International (Cayman) Ltd.

The Madoff firm began liquidating in December 2008, with the appointment of the trustee under the Securities Investor Protection Act. Bernard Madoff individually went into an involuntary Chapter 7 liquidation in April 2009. His bankruptcy case was consolidated with the firm's liquidation. Madoff is serving a 150-year prison sentence following a guilty plea.

The Greiff case in district court is Picard v. Greiff, 11- 03775, U.S. District Court, Southern District of New York (Manhattan). The Wilpon suit in district court is Picard v. Katz, 11-03605, U.S. District Court, Southern District New York (Manhattan). The liquidation in bankruptcy court in The Madoff liquidation case is Securities Investor Protection Corp. v. Bernard L. Madoff Investment Securities LLC, 08-01789, U.S. Bankruptcy Court, Southern District of New York (Manhattan). The criminal case is U.S. v. Madoff, 09-cr-00213, U.S. District Court, Southern District of New York (Manhattan).

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