



A Message from the SIPA Trustee’s Chief Counsel, David J. Sheehan

Update: *On March 17, 2015, a petition for a writ of certiorari was filed with the Supreme Court of the United States on behalf of the SIPA Trustee by his legal team, including Thomas C. Goldstein of Goldstein & Russell and Chief Counsel David J. Sheehan of BakerHostetler. The petition seeks a review of the December 8, 2014 Second Circuit decision regarding the “safe harbor/stockbroker” defense which not only affects the look-back period for the SIPA Trustee’s recovery claims for fictitious profits and principal, but also his ability to recover preferential transfers, as discussed in this letter. The Second Circuit decision currently bars the SIPA Trustee from recovering and distributing almost \$2 billion to the victims of Madoff’s Ponzi scheme and calls into question an additional \$2 billion of potential recoveries and distributions. A link to a copy of the writ of certiorari filing can be found [here](#).*

On June 22, 2015, the Supreme Court denied the SIPA Trustee’s petition to review the December 8, 2014 Second Circuit decision regarding the “safe harbor/stockbroker” defense, letting the Second Circuit decision stand. In a statement, the SIPA Trustee noted that approximately \$5 billion of potential recoveries still remain and he and his Counsel will continue to pursue these amounts in the Bankruptcy Court.

March 12, 2015 – The SIPA Trustee reached several agreements in late 2014 – including with feeder funds Herald, Primeo, and Senator – which added significant amounts to the BLMIS Customer Fund and resulted in a fifth interim distribution of recovered funds to the victims of the Madoff fraud. The past twelve months have been among our most active periods and the coming year already promises to be equally active, with the SIPA Trustee’s team of professionals working diligently on a number of fronts, in and out of courtrooms, using all the legal tools at our disposal.

Through it all, our primary goal remains the same: to recover the maximum amount possible for the benefit of Bernard L. Madoff Investment Securities LLC (BLMIS) customers with allowed claims.

The SIPA Trustee has made significant progress toward that goal, recovering more than \$10.5 billion to date. We understand that after more than six years of negotiations and legal actions around the globe, it’s logical to ask: How much more can be recovered? When will those recoveries be fully distributed? To reach our goal of returning 100 percent of principal losses by those customers who filed claims, at least \$7 billion in principal remains to be recovered. Where will that money come from?

The bulk of the remaining principal losses can only be recovered through either litigation or the negotiation of settlements in the more than 700 legal actions that remain outstanding in the Madoff Recovery Initiative. These cases can be divided into two broad categories: cases in which the SIPA Trustee is seeking to recover only fictitious profits and actions in which the SIPA Trustee is seeking to recover fictitious profits and principal invested.

Current law permits the SIPA Trustee to recover fictitious profits – net amounts withdrawn from BLMIS in excess of principal invested – for the two-year period preceding the liquidation, from December 2006 to December 2008. Fictitious profits are comprised of the principal investments of other customers, and the SIPA Trustee has a responsibility to recover these funds, place them in the Customer Fund, and distribute the recoveries to eligible customers of BLMIS who have not yet recovered the initial principal they entrusted to Madoff. The current two-year total sought by the SIPA Trustee under this category is approximately \$1.6 billion.

There are also cases where the SIPA Trustee alleges that BLMIS customers knew or should have known of fraud at BLMIS. These cases involve feeder funds and other sophisticated investors who claimed to have conducted due diligence on BLMIS. Current law permits the SIPA Trustee, in these cases, to pursue principal deposited in BLMIS for the two years prior to the liquidation in addition to fictitious profits. For these cases, the SIPA Trustee is seeking approximately \$3.7 billion.

The SIPA Trustee is also pursuing appeals of certain lower court decisions that, once resolved, may permit the SIPA Trustee to seek larger recoveries or to return funds currently held in reserve to BLMIS customers with allowed claims.

One prominent issue currently under consideration for appeal to the United State Supreme Court is the applicability of the securities “safe harbor,” which determines the look-back period for the SIPA Trustee’s recovery claims for fictitious profits and principal and his ability to recover preferential transfers. In this appeal, the SIPA Trustee seeks to apply New York State law, which extends the look-back period for his recovery claims from two years to six years. If the Supreme Court agrees that the securities safe harbor does not apply, the SIPA Trustee’s litigation seeking an additional \$4.3 billion for the Customer Fund will proceed.

Currently, not all recovered funds are eligible for distribution because reserves must be maintained for issues on appeals or in pending litigation. Nearly \$1.5 billion of recovered money has been held in reserve – for years – due to an appeal in which certain BLMIS customers argued that they are entitled to receive interest as part of their net equity claims. The Second Circuit recently reaffirmed that BLMIS customers are not entitled to such “time-based damages.” The SIPA Trustee will file an application to distribute these funds as soon as possible and hopes that the appellants will refrain from filing a petition for certiorari with the Supreme Court so that distributions may proceed promptly.

In addition to the amounts recovered, which benefit BLMIS customers with allowed claims, another way in which the SIPA Trustee’s work benefits those customers is through negotiations on reductions in the customer claims asserted against the estate as part of the settlement process. In those cases, a claim is reduced or eliminated and, as a result, the remaining BLMIS allowed claimants receive a larger share of the Customer Fund. Settlements of this type have already had a substantial impact on the amount of funds available to Madoff victims.

While much has been accomplished, much remains to be done in the Madoff Recovery Initiative. Sometimes our work makes the headlines, but more often than not, the SIPA Trustee and his

teams work tirelessly behind the scenes and in the courtrooms. Our top priorities are the return of customer property to BLMIS customers and the efficient administration of the case.

And every step along the way, both the SIPA Trustee and I continue to take seriously our ethical and legal obligations to keep the public informed. We hope that this letter is one more way of doing that.