

*For the Record – May 25, 2012*

*Attributable to Amanda Remus, Public Relations Liaison for the SIPA Trustee & Counsel*

The complex global legal actions undertaken by the SIPA Trustee and the bankruptcy laws applicable to those actions are critical to the BLMIS Recovery Initiative. These important topics are sometimes misunderstood, misinterpreted or misrepresented in the press. To assure that correct and up-to-date information regarding the work of the SIPA Trustee and the recoveries he has achieved is available to the public, we will, from time to time, address and clarify inaccurate or incomplete press coverage and commentary in this new website feature, For the Record.

### **Distributions from the Customer Fund**

It was recently reported that the SIPA Trustee had arbitrarily decided to delay distribution of recovered funds. The coverage implied that there are additional funds that could be distributed now.

It is the intention of the SIPA Trustee to distribute recoveries from the BLMIS Customer Fund as quickly as possible. That desire, however, has been frustrated by ongoing litigation and appeals. The SIPA Trustee has recovered or entered into settlement agreements to recover more than \$9.1 billion for the Customer Fund. All of these settlements have been approved by the Bankruptcy Court as appropriate and reasonable. Some of these settlements have been affirmed on appeal, but still further appeals have been taken to either the United States District Court or to the Second Circuit Court of Appeals. While the SIPA Trustee is confident that the appeals on these settlements will fail, as they already have on several occasions, until these appeals are resolved, the SIPA Trustee cannot distribute those funds.

The SIPA Trustee's confidence in the ultimate outcome of these appeals is based on the following facts: Of 16,500 claimants, only two objections were filed to the Picower settlement, only one objection was filed to the settlement with the family of Norman F. Levy and only one objection was filed to the Tremont settlement. The Picower and Levy Family settlements have already been approved by both the United States Bankruptcy Court and the District Court for the Southern District of New York.

As for the settlement with Tremont, which was approved by the Bankruptcy Court on September 22, 2011, the SIPA Trustee has made a motion to dismiss that appeal as lacking foundation. That motion will be heard by the District Court on May 29, 2012. Hopefully, a ruling affirming the settlement will be forthcoming and there will be no further appeal on that decision.

In addition, although the SIPA Trustee's definition of net equity has been upheld by both the Bankruptcy Court and the Second Circuit Court of Appeals, certain parties have petitioned the United States Supreme Court to review the Second Circuit's decision. These petitions are still pending review as of May 2012. If the petitions are denied, the SIPA Trustee expects to be in a position to make a second interim distribution to allowed claimants. Updates on future distributions will be posted on the SIPA Trustee's website.

It is essential to remember that the SIPA Trustee is bound by any final decision related to the appeals, and therefore would have to calculate pro rata distributions to reflect any possible decision. Thus, while appeals remain open, the timing and amount of pro rata distributions from the Customer Fund must accommodate all potential outcomes.

### **Current Litigation**

The litigation brought by the SIPA Trustee is complex and varied, a reflection of the intricate, global Madoff Ponzi scheme itself. The basic reason behind these legal actions is often overlooked: while Bernard Madoff portrayed BLMIS as an investment advisory firm, Madoff was simply taking one person's money and giving it to somebody else. The lawsuits brought by the SIPA Trustee are designed to return the money to the Customer Fund for those claimants who did not receive all of their deposited funds back. In addition, the lawsuits seek to hold those that either enabled or perpetuated Madoff's scheme accountable for their participation in the harm caused by the fraud.

Over the last year, there have been a number of decisions in the Madoff litigation by the District Court. It would be inappropriate to discuss them here because they are either the subject of appeals to the Second Circuit or are otherwise being actively litigated in both the Bankruptcy

Court and the District Court. In the end, the SIPA Trustee hopes to recover all of the money that was fraudulently transferred in Mr. Madoff's fraud for those parties who filed claims—approximately \$17.3 billion. However, this number is not a fixed amount for several reasons.

As the SIPA Trustee settles cases, in some instances, the settling party is a customer who did not get all of his money back. When they settle, these defendants are sometimes paying principal back to the Customer Fund – if, for example, they withdrew principal as part of a preferential transfer – so that money can be then distributed equitably among all customers. In those situations, the settling customer's claim will be allowed and will increase by some or all of the amounts repaid to the Customer Fund.

An easier way to think of it may be like this: When BLMIS failed, some people came out ahead of others in that they had already received their principal back. Others had not. Thus, in order to make all customers equal, the SIPA Trustee needs to recover at least \$17.3 billion, which is the amount of principal those customers lost.

The SIPA Trustee's legal strategy has – to date – secured court approval of settlements of more than \$9.1 billion, subject to certain appeals. We are more than halfway home. The SIPA Trustee is going to proceed with the litigation as directed by the courts in the hope of reaching – and surpassing – that goal.

### **Fees and Expenses**

Another topic that is widely misunderstood and misreported in the media is the fees and expenses of the SIPA Trustee. As the SIPA Trustee has stated on many occasions, not one penny of recovered customer money is used to pay any of the legal fees and expenses incurred by the SIPA Trustee. These fees and expenses are all paid from the fund overseen by SIPC in accordance with the provisions of the SIPA statute.

The SIPC fund consists of monies paid into the fund by broker-dealers. All broker-dealers who are registered with the SEC are members of SIPC. The SIPA statute is designed to maximize the return of a customer's net equity by having SIPC pay all of the expenses and fees so that none of

those costs come at the expense of customers, who are given the first priority under the SIPA statute.

It is also important to remember that the fraud confronting the SIPA Trustee is probably the most complex and far reaching in history, stretching over several decades and throughout the global financial community. Billions of dollars are at stake, as reflected in the recoveries and settlements achieved to date. Equally complex are the lawsuits that must be brought to recover customer property. No one with knowledge of the fraudulent enterprise was available to assist the SIPA Trustee in this effort. Also, working against the SIPA Trustee is a large contingent of law firms and accountants seeking to deny the SIPA Trustee the ability to recover these funds from their clients. The SIPA Trustee therefore had to assemble a team that is equipped to take on these tasks and see them to their conclusion.

This endeavor requires a strong, aggressive legal effort. To date, however, that effort has produced significant results for the customers injured by Madoff's fraud. Based on what the SIPA Trustee has achieved (for example, recovering funds at the rate of approximately \$7.5 million dollars a day), the SIPA Trustee's fees and expenses have been found to be fair and reasonable under all of these circumstances by SIPC, the United States Bankruptcy Court, and when challenged on appeal, the District Court.

### **The \$64 Billion Question**

We would like to address one more topic in this *For the Record*. At the beginning of the Madoff Recovery Initiative, it was widely reported that the Madoff fraud totaled approximately \$65 billion in losses. That figure was the aggregate value shown on the final BLMIS customer statements, dated November 30, 2008. Because none of the BLMIS statements reflected real securities holdings or trading activity, however, the amounts shown on those statements are nothing but fiction.

Many claimants filed claims using their last statement amounts. The figures shown on the last statements add up to the fictitious number of approximately \$65 billion. Since May 2011, the SIPA Trustee has been reporting that this amount has been reduced to approximately \$57 billion.

The reasons for this are manifold. Some customers with accounts did not file claims by the July 2, 2009 statutory bar date. Further reductions occurred in connection with settlements with the estate of Jeffrey Picower, the Norman F. Levy Family, Fairfield Sentry, and others. These and other settlements required the irrevocable withdrawal of those customer claims, resulting in an increase in recoveries for the Customer Fund and a reduction in the amount of claims against the estate.

These reductions have a significant impact on the net equity calculation. So long as the last statement method for calculating net equity is on appeal, all distributions by the SIPA Trustee must take into account the fact that he may have to at some point distribute the amount claimed on the last statement. However, because the claims of certain parties have been disallowed through settlement or were not timely filed, the SIPA Trustee does not have to reserve funds for them. Accordingly, he reduced the amount claimed from his calculation of the reserve so that the initial distribution could be greater to those with allowed claims.

It is important to note that neither the approximately \$65 billion nor the \$57 billion amounts, respectively, are in any way related to the SIPA Trustee's projected recoveries, as has been erroneously reported.

We hope you find these clarifications and explanations helpful. If you have additional questions, please check elsewhere on this website for FAQs and other resources designed to answer questions about the Madoff Recovery Initiative. Members of the media should contact me, Amanda Remus, Public Relations Liaison for the SIPA Trustee & Counsel, at [madofftrustee@bakerlaw.com](mailto:madofftrustee@bakerlaw.com).