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Assessing Irving Picard's Writ of Certiorari in *Picard v. JP Morgan Chase*: Another Chapter in the Saga of Bernie Madoff and His Impact on the Securities Industry

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**ASSESSING IRVING PICARD’S WRIT OF
CERTIORARI IN *PICARD V. JPMORGAN
CHASE*: ANOTHER CHAPTER IN THE SAGA
OF BERNIE MADOFF AND HIS IMPACT ON
THE SECURITIES INDUSTRY**

BRYCE CULLINANE

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I. INTRODUCTION

“Inmate Number 61727054 . . . is the best-known prisoner currently held at the sprawling [f]ederal [c]orrectional [c]omplex on the outskirts of Butner, North

Carolina.”¹ He is serving a 150-year sentence² for stealing between \$17 and \$30 billion³ from unknowing investors and pulling off “the biggest Ponzi scheme in history.”⁴ His name is Bernard “Bernie” Madoff (Madoff). He began his career as a legitimate securities broker but transitioned to falsifying trading reports and customer statements to reflect false profits.⁵ He built a fortune by constantly raising money from new investors to pay off older investors wanting to cash out and keeping the rest for himself and his extravagant lifestyle. When he was exposed, Madoff’s investors were awakened to two harsh realities: the investments they thought they owned did not exist, and their principal investment was long gone.

When a securities brokerage firm is exposed as a Ponzi scheme, the law’s first goal is to return money to defrauded investors.⁶ But doing so is not easy; figuring out what they are entitled to and where the money should come from is complicated. The massive size of Madoff’s scheme, run through Bernard L. Madoff Investment Securities (BLMIS),⁷ and the many complex transactions involved made these determinations even more difficult.⁸

¹ Diana B. Henriques, *The Wizard of Lies: Bernie Madoff and the Death of Trust* XVIII-XXIV (2011).

² *Id.*

³ Madoff ran his scheme for decades, and that, combined with the lack of transparency of his operation, makes an exact number of how much he stole from innocent investors impossible to calculate. Lauren Sher, *How Much Did Madoff Actually Make Off With?*, ABC News (Mar. 6, 2009, 12:49 PM), <http://abcnews.go.com/blogs/headlines/2009/03/how-much-did-ma/>. Adding complexity to this issue is the question of whether the amount “stolen” was the amount invested into the scheme, the principal, or the amount the fraud operator touted as the total return, profit, and principal. See generally Kathy B. Phelps & Steven Rhodes, *The Ponzi Book: A Legal Resource for Unraveling Ponzi Schemes* § 20.04 (1st ed. 2013). Some have estimated principal losses at \$17 billion. Erik Larson, *Madoff Trustee Tops \$10 Billion Recovery With Bank Deal*, Bloomberg (Jan. 8, 2014, 10:23 AM), <http://www.bloomberg.com/news/2014-01-07/madoff-trustee-to-get-543-million-in-jpmorgan-accord.html>.

⁴ Henriques, *supra* note 1.

⁵ Madoff was also running his operation as an unregistered investment advisor. Liz Moyer, *How Regulators Missed Madoff*, Forbes (Jan. 27, 2009, 3:20 PM), http://www.forbes.com/2009/01/27/bernard-madoff-sec-business-wall-street_0127_regulators.html (“Madoff’s firm [was not] even registered as an investment advisor until 2006.”).

⁶ In the bankruptcy of a business that is not a securities brokerage, secured creditors are paid before unsecured creditors. Charles J. Tabb, *The Law of Bankruptcy* 70 (2nd ed. 2009). Customers of a securities broker-dealer are considered unsecured creditors. *Id.* (“Once the estate is reduced to money, the trustee must make distribution to creditors [S]ecured creditors will either be given their collateral or will be paid the value of that collateral. Unsecured creditors holding allowed claims will then be paid in the order specified by [11 U.S.C. § 726].”). As will be seen later in this note, customers of a securities broker-dealer are given a higher priority in liquidation than they would be in a typical bankruptcy proceeding.

⁷ In the bankruptcy context, the organization or person who enters bankruptcy, either voluntarily or involuntarily, is referred to as the “debtor.” See generally Tabb, *supra* note 6.

⁸ This process is still not complete. Many investors have yet to see their claims fully processed by the trustee. For example, a recent press release from the attorney representing Mr. Picard stated “the SIPA Trustee [Mr. Picard] anticipates recovering additional assets through litigation and settlements. Final resolution of certain disputes will permit the SIPA Trustee to further reduce the reserves he is

A liquidating trustee, Irving Picard (Picard), was appointed to wind BLMIS up.⁹ He determines who gets what and where the money should come from.¹⁰ The law provides a framework for getting money back to customers, primarily through fraudulent transfer lawsuits—sometimes called “claw back” suits—and the sale of assets. However, statutes of limitations and other restrictions often make total recovery impossible. The Madoff case is no exception; however, Picard has exercised zealous advocacy to explore other options of recovering money for defrauded investors.¹¹ One of his efforts is the subject of this case note: *Picard v. JPMorgan*.¹²

In the case, Picard sued numerous financial institutions that made money through routine transactions and investments with BLMIS, alleging they knew about, or should have known about, the fraud, and they breached many duties by not informing regulators.¹³ Picard argued these firms should not keep the money and fees they made from Madoff at the expense of innocent investors.¹⁴ He failed to mention these firms lost money in the scheme and had already been subjected to fraudulent transfer lawsuits.

What makes the *Picard* case notable is Picard brought many of the claims on behalf of defrauded investors. The general rule is a trustee only has standing to sue on behalf of the debtor—here, BLMIS.¹⁵ As such, the Federal District Court for the Southern District of New York dismissed *Picard* for lack of standing.¹⁶ Picard argued to the Second Circuit Court of Appeals the Securities Investor Protection Act (SIPA) and section 544 of the Bankruptcy Code (the Code) gave him standing. The Second Circuit rejected these arguments.¹⁷ Picard appealed to the United

required to maintain, which will allow him to make additional distributions to customers in the future.” The Madoff Recovery Initiative, http://www.madofftrustee.com/twitter-feed47.html?post=17#_VH6lD2TF8zE (last visited Dec. 2, 2014). See generally The Madoff Recovery Initiative, MADOFFTRUSTEE.COM, <http://www.madofftrustee.com/> (last visited Feb. 22, 2014).

⁹ “The process of settling accounts and liquidating assets in anticipation of a partnership’s or a corporation’s dissolution.” BLACK’S LAW DICTIONARY 1738 (9th ed. 2009).

¹⁰ The bankruptcy court must approve many of the actions a bankruptcy trustee takes. For example, the decisions of how to calculate who gets what amount, the plan to distribute property, and the decision to claw back money. See generally TABB, *supra* note 6.

¹¹ A bankruptcy trustee has a fiduciary obligation to maximize the money recovered for the estate of the debtor. Stephen Rhodes, *The Fiduciary and Institutional Obligations of a Chapter 7 Bankruptcy Trustee*, 80 AM. BANKR. L.J. 147, 164–65 (2006) (“[A] trustee is required to maximize the distribution of the estate.”).

¹² *In re Bernard L. Madoff Inv. Secs. LLC.*, 721 F.3d 54, 58 (2d Cir. 2013) (hearing two consolidated district court cases).

¹³ JPMorgan settled with Picard. See Larson, *supra* note 3.

¹⁴ See *infra* note 192.

¹⁵ COLLIER ON BANKRUPTCY ¶ 548.48 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014) (“A trustee lacks standing to assert claims of creditors against third parties who are alleged to bear responsibility for the debtor’s losses.”); *Id.* at SP2-Monograph 2, Section 4 (“[Generally,] the trustee does not have standing to bring actions on behalf of individual creditors.”).

¹⁶ *Picard v. JPMorgan Chase & Co.*, 460 B.R. 84, 106 (S.D.N.Y. 2011).

¹⁷ *In re Bernard L. Madoff Inv. Secs. LLC.*, 721 F.3d 54 (2d Cir. 2013).

States Supreme Court, and, as of this writing, his writ is pending before the Court.

Picard's writ argued there is a circuit split concerning the standing of a trustee to sue third parties under both SIPA and 544 of the Code.¹⁸ He argued the Second Circuit was on the wrong side of these splits, reading the law more narrowly than other circuits.¹⁹ In the alternative, he argued, if the statutes are silent on standing in this case, the interests of defrauded customers should prevail over financial institutions that made millions.²⁰

An objective analysis of Picard's writ shows the Second Circuit should be affirmed. Picard's arguments are long on emotional appeal and customer-centric public policy but short on the law. The Second Circuit decision is in line with the intent of Congress. Furthermore, adopting Picard's interpretation would raise many issues and create many problems in the financial services industry. Part II of this note provides background on SIPA and the Securities Investor Protection Corporation (SIPC), as well as Section 544 of the Code.²¹ Part III provides background on the *Picard* case, including a brief discussion of Madoff's scheme and Picard's work to recover money for investors.²² Part IV outlines the Second Circuit's decision in *Picard*,²³ and Part V dissects and analyzes Picard's Supreme Court writ.²⁴ Part VI comments on the implications of affirming the Second Circuit.²⁵

II. HISTORICAL BACKGROUND

A. Ponzi Schemes

Charles Ponzi spent his life looking for a get-rich-quick scheme.²⁶ In 1919, he invented one. He planned to speculate on international reply coupons²⁷ and make wild profits.²⁸ However, as soon as he began, investor money in hand, he

¹⁸ See *infra* Part V and accompanying notes 209–98.

¹⁹ *Id.*

²⁰ *Id.*

²¹ See *infra* Part II and accompanying notes 26–76.

²² See *infra* Part III and accompanying notes 77–131.

²³ See *infra* Part IV and accompanying notes 132–208.

²⁴ See *infra* Part V and accompanying notes 209–298.

²⁵ See *infra* Part VI and accompanying notes 299–303.

²⁶ Ponzi, after his first prison stint, “was as eager to get rich . . . with one of the many plans he had cooked up in prison.” MITCHELL ZUCKOFF, PONZI'S SCHEME: THE TRUE STORY OF A FINANCIAL LEGEND 51 (Random House Publishing Group 2005).

²⁷ “In April 1906, [multiple nations] gathered in Rome with the goal of making it easier to send mail across national borders[,] . . . [so they] created a system of international postal currency, paper that held a fixed value from one country to the next and could be redeemed for stamps in any post office of a country belonging to [the participating nations]. They called the currency they created International Reply Coupons.” *Id.* at 93–96

²⁸ Ponzi's model was based on sending funds to a contact in Barcelona, who would send coupons back, and, by “redeeming them in Boston[,] . . . Ponzi would earn a profit before expenses of ten cents,

learned the law²⁹ and the limited volume of stamps available made a profitable business improbable.³⁰ That did not stop Ponzi from collecting investors' money for his idea and alluring them with fifty percent interest every forty-five days.³¹ If investors came calling after that time, Ponzi would implore them to leave their money with him and compound another fifty percent. If the investors declined, he would give them the money of a fresh investor, flaunted as "profits." To his many skeptics, Ponzi said it would be impossible to sustain his lifestyle and pay investors their earnings if he was a scam. In reality, his lifestyle and investor payouts were paid for with the money of others.³²

By 1920, when news got out Ponzi was being investigated for fraud, hoards of investors came clamoring for their money back, and Ponzi's insolvency was exposed.³³ In 1920, Ponzi was convicted of fraud.³⁴ In only "eight months he took in \$9,582,000, for which he issued his [promissory] notes for \$14,374,000. . . . He made no [legitimate] investments of any kind."³⁵ The Ponzi scheme was born.³⁶ Today, despite their notoriety,³⁷ Ponzi schemes are alive and well³⁸ and commonly include the same red flags.³⁹

or 10 percent, on each dollar's worth of coupons he bought." *Id.* at 95.

²⁹ The postal service, in response to a letter from Ponzi asking about the coupons, said: "You are advised that International Reply Coupons are issued . . . for use in pre-paying international reply postage. To effect that purpose they must be exchanged for stamps of foreign countries[,] . . . [t]hey are not intended as a medium of speculation, and the department cannot sanction their use for that purpose." *Id.* at 120–21.

³⁰ The postal service was concerned about Ponzi, so "the Italian postal officials abruptly suspended sales of reply coupons [in 1919]. Their counterparts in France and Romania quickly followed." *Id.* at 125.

³¹ *Id.* at 8.

³² See *In re Manhattan Inv. Fund Ltd.*, 397 B.R. 1, 8 (S.D.N.Y. 2007) ("[A Ponzi scheme operator uses] money from new investors . . . to pay artificially high returns to earlier investors in order to create an appearance of profitability and attract new investors.").

³³ See generally ZUCKOFF, *supra* note 26.

³⁴ *Id.*

³⁵ *Cunningham v. Brown*, 265 U.S. 1, 8 (1924) (discussing Charles Ponzi).

³⁶ Before Ponzi, this scheme was known as "robbing Peter to pay Paul." ZUCKOFF, *supra* note 26, at 106.

³⁷ *Avoiding Investment Scams*, FINRA.ORG (2013) <http://www.finra.org/web/groups/investors/@inv/@protect/@ia/documents/investors/p125862.pdf>.

³⁸ See Jeff Sommer, *The Bridges Are New, but Business Scams Are Timeless*, N.Y. TIMES, Sep. 29, 2013, <http://www.nytimes.com/2013/09/29/your-money/the-bridges-are-new-but-business-scams-are-timeless.html>; Stephen Greenspan, *Why We Keep Falling for Financial Scams*, WALL ST. J., Jan. 3, 2009, <http://online.wsj.com/news/articles/SB123093987596650197>; Jessica D. Gabel, *Midnight in the Garden of Good Faith: Using Clawback Actions to Harvest the Equitable Roots of Bankrupt Ponzi Schemes*, 62 CASE W. RES. L. REV. 19, 77 (2011) ("[There] is no shortage of Ponzi schemes [today]. In the first six months of 2011 alone, forty-five possible Ponzi schemes [were] reported.").

³⁹ Sandra S. Benson, *Recognizing The Red Flags Of A Ponzi Scheme*, CURRENT ACCOUNTS, Nov-Dec. 2009, available at <http://www.gscpa.org/Content/Files/Pdfs/Current%20Accounts/CANovDec09.pdf>.

B. SIPA and SIPC

In the late 1960s, a sudden market downturn forced many securities broker-dealers into insolvency.⁴⁰ This not only struck a blow to the economy,⁴¹ but investors who had securities on deposit with defunct firms were forced into lengthy bankruptcy proceedings.⁴² This undermined confidence in the securities market.⁴³ To restore that confidence and support the securities industry, Congress passed SIPA in 1970.⁴⁴ SIPA's primary goal was, and still is, to engender confidence in securities brokers⁴⁵ by giving their customers first priority in bankruptcy⁴⁶ and

⁴⁰ On April 25, 1978, Hugh F. Owens, then Chairman of the Securities Investor Protection Corporation commented to Congress:

SIPA had its origins in the difficult years of 1968-1970 when the paper crunch brought on by an unexpectedly high trading volume in securities was followed by the most severe decline in stock prices since the Great Depression. Hundreds of broker/dealers were merged, acquired or simply went out of business. Some were unable to meet their obligations to their customers and went bankrupt. Public confidence in our securities markets was in jeopardy.

Securities Investor Protection Act Amendments: Hearing Before the Senate Subcommittee on Securities of the Committee on Banking, Housing and Urban Affairs, 95th Cong. 10-11 (1978) (statement of Hugh F. Owens, Chairman of the Securities Investor Protection Corporation), available at http://archive.org/stream/securitiesinves00secugoog/securitiesinves00secugoog_djvu.txt [hereinafter *Securities Investor Protection Act Amendments*].

⁴¹ *Sec. Investor Prot. Corp. v. Barbour*, 421 U.S. 412, 415 (1975) (“[T]his [failure] also threatened a ‘domino effect’ involving otherwise solvent brokers that had substantial open transactions with firms that failed.”).

⁴² *Id.* (“Following a period of great expansion in the 1960’s, the securities industry experienced a business contraction that led to the failure or instability of a significant number of brokerage firms. Customers of failed firms found their cash and securities on deposit either dissipated or tied up in lengthy bankruptcy proceedings.”).

⁴³ H.R. REP NO. 91-1613, at 1 (1970), reprinted in 1970 U.S.C.C.A.N. 5254, 5255 (“[T]he serious and persistent financial problems besetting the securities industry in recent months have led to the voluntary liquidations, mergers, receiverships or, less frequently, bankruptcies of a substantial number of brokerage houses. Such failures may lead to loss of customers’ funds and securities with an inevitable weakening of confidence in the U.S. securities markets.”); Douglas C. Michael, *Self-Regulation for Safety and Security: Final Minutes or Finest Hour?*, 36 SETON HALL L. REV. 1075, 1115-16 (“[I]n 1967 . . . [a]n increasing volume of stock trades coupled with outdated settlement and clearing processes, followed by a significant market slump from 1969 to 1970 . . . resulted in an unprecedented number of brokerage firm failures . . . [which created] loss of investor confidence [in the securities market] . . .”).

⁴⁴ PL 91-598, December 30, 1970, 84 Stat. 1636; 1970 U.S.C.C.A.N. 5254, 5255 (“The primary purpose of the reported bill is to provide protection for investors if the broker-dealer with whom they are doing business encounters financial troubles. In these circumstances public customers sometimes encounter difficulty in obtaining their cash balances or securities from the broker-dealers. Sometimes it is just a matter of time until the liquidation is completed, but, unfortunately, in some situations the customer never fully recovers that to which he is entitled. The proposed legislation would provide for the establishment of a fund to be used to make it possible for the public customers in the event of the financial insolvency of their broker, to recover that to which they are entitled, with a limitation . . . for each customer on the amounts to be provided by the proposed fund.”).

⁴⁵ *Barbour*, 421 U.S. at 415 (“Following a period of great expansion in the 1960’s, the securities industry experienced a business contraction that led to the failure or instability of a significant number

covering⁴⁷ losses caused by broker-dealer insolvency, up to a statutory cap.⁴⁸ Fees assessed on members of the securities industry fund this.⁴⁹ The fund only protects customers when their broker becomes insolvent; it is not insurance. The SIPC, a non-profit organization,⁵⁰ was established by Congress to manage the fund and related legal issues.

In 1978, Congress amended SIPA in two major respects. First, it increased the amount of protection customers may receive, so the amount today is

of brokerage firms. Customers of failed firms found their cash and securities on deposit either dissipated or tied up in lengthy bankruptcy proceedings. In addition to its disastrous effects on customer assets and investor confidence, this situation also threatened a ‘domino effect’ involving otherwise solvent brokers that had substantial open transactions with firms that failed. Congress enacted the SIPA to arrest this process, restore investor confidence in the capital markets, and upgrade the financial responsibility requirements for registered brokers and dealers.”). In creating an insurance system for broker-dealers, SIPA arguably shifted the burden of responsibility away from broker-dealers and encouraged them to be more risky. See Thomas W. Joo, *Who Watches the Watchers? The Securities Investor Protection Act, Investor Confidence, and the Subsidization of Failure*, 72 S. CAL. L. REV. 1071, 1075 (1999) (“[A]llocating the risk of losses due to failure to the parties best able to avoid such loss is a more efficient means to the long-term protection of customers, as well as the long-term health of the industry.”).

⁴⁶ *Mishkin v. Peat, Marwick, Mitchell & Co.*, 744 F. Supp. 531, 555 (S.D.N.Y. 1990) (“The basic scheme of SIPA is to create a preferred class of creditors. Investors who had left identifiable securities in their name with the broker-dealer or who had left cash balances to be used for investment purposes with the broker-dealer [which together are referred to as ‘net equity claims’] are entitled to receive such securities and cash from the liquidator before other creditors may share in the estate.”); *Lopez v. Zarembo*, No. 3:08CV01132, 2009 U.S. Dist. WL 36617, at *4 (N.D. Ohio Jan. 5, 2009) (“A SIPA liquidation procedure is ‘essentially a bankruptcy proceeding’ for financially troubled broker-dealers. In this liquidation, ‘customers’ of insolvent securities broker-dealers receive preference over general creditors in the distribution of a fund designated customer property.”) (citations omitted).

⁴⁷ The SIPC fund is not technically an “insurance” fund because it does not protect against any situation, only broker-dealer insolvency; does not protect all money, typically only the principal; and there are many restrictions on customer claims. COLLIER ON BANKRUPTCY, *supra* note 15, at 12.16 (“Payments from the SIPC Fund are in the form of advances to the trustee, followed by distributions by the trustee to eligible claimants. This allows customers to receive securities or cash prior to a determination of each customer’s ratable share and prior to a complete marshaling of customer property.1 A SIPC advance can only satisfy customer claims for the amount by which a customer’s net equity exceeds his ratable share of customer property. Advances from the SIPC fund are not insurance to customers.”).

⁴⁸ 15 U.S.C. § 78fff-3 (2010) (“SIPC shall advance to the trustee such moneys, not to exceed \$500,000 for each customer, as may be required to pay or otherwise satisfy claims for the amount by which the net equity of each customer exceeds his ratable share of customer property . . .”).

⁴⁹ All those who are registered as broker-dealers under the Securities Act are required to be members of SIPC. 15 U.S.C. § 78ecc (2010) (“[A]ll persons registered as brokers or dealers under section 78o(b) of” Title 15.”). Today, members of the SIPC are assessed at a fee that equals .0025% of their net operating revenue. *Assessment Rate*, SIPC.ORG (Sept. 13, 2013), <http://www.sipc.org/formembers/assessment-rate>.

⁵⁰ 15 U.S.C. § 78ecc (2010) (“SIPC shall be a nonprofit corporation . . . [and] not be an agency or establishment of the United States Government.”); see Daniel J. Morse, *When A Securities Brokerage Firm Goes Broke A Primer on the Securities Investment Protection Act of 1970*, AM. BANKR. INST. J. 34, (2006) (“SIPC is a nonprofit private membership corporation to which almost all brokers and dealers registered under the Securities Exchange Act of 1934 belong. SIPC is neither an agency nor an establishment of the federal government.”). 15 U.S.C. § 78ddd (2010) sets out the rules for SIPC’s assessment of fees and accompanying limitations on its power to do so.

\$500,000,⁵¹ with a cash limit of \$250,000,⁵² and, second, it allowed customers to be compensated in the form of securities.⁵³ The purpose of the second change was “to achieve better, faster[,] and more efficient methods of investor protection.”⁵⁴ Since 1970, the SIPC has distributed more than \$2 billion to customers of insolvent broker-dealers, is currently staffed by approximately forty people,⁵⁵ and the fund sits around \$1.5 billion.⁵⁶ The board represents both governmental and industry interests.⁵⁷

If a securities broker becomes insolvent, SIPA can elect to manage the liquidation.⁵⁸ If the SIPC chooses to do so,⁵⁹ it appoints a trustee, and the Code generally governs.⁶⁰ The trustee is “charged with assessing claims [of brokerage

⁵¹ 15 U.S.C. § 78fff-3 (2010) (“[T]o provide for prompt payment and satisfaction of net equity claims of customers of the debtor, SIPC shall advance to the trustee such moneys, not to exceed \$500,000 for each customer . . .”).

⁵² *About SIPC, History and Track Record*, SIPC.ORG, <http://www.sipc.org/about-sipc/history> (last visited Feb. 23, 2014).

⁵³ Kenneth J. Caputo, *Customer Claims In SIPA Liquidations: Claims Filing And The Impact Of Ordinary Bankruptcy Standards On Post-Bar Date Claim Amendments In SIPA Proceedings*, 20 AM. BANKR. INST. L. REV. 235, 235 (2012) (“The Securities Investor Protection Act [(1)] authorizes the court-appointed trustee in a SIPA proceeding to transfer customer accounts to another viable brokerage firm, and the transfer may be facilitated by funding advances from the Securities Investor Protection Corporation. [(2)] Thus, where the books and records of the brokerage firm are complete and accurate, customer accounts may be transferred efficiently, and the vast majority of customers will suffer no ill consequences as a result of the firm’s financial failure or insolvency.”).

⁵⁴ *Securities Investor Protection Act Amendments*, *supra* note 40.

⁵⁵ *Annual Report*, SIPC.ORG (2012) <http://www.sipc.org/Content/media/annual-reports/2012-annual-report.PDF> (“The SIPC staff, numbering 39, initiates the steps leading to the liquidation of a member, advises the trustee, his counsel and accountants, reviews claims, audits distributions of property, and carries out other activities pertaining to the Corporation’s purposes.”) [hereinafter *Annual Report*].

⁵⁶ *About the SIPC; The SIPC Fund*, SIPC.ORG <http://www.sipc.org/about-sipc/the-sipc-fund> (last visited Feb. 22, 2014).

⁵⁷ *Annual Report*, *supra* note 55 (“[A] board of seven directors determines policies and governs operations. Five directors are appointed by the President of the United States subject to Senate approval. Three of the five represent the securities industry and two are from the general public. One director is appointed by the Secretary of the Treasury and one by the Federal Reserve Board from among the officers and employees of those organizations. The Chairman and the Vice Chairman are designated by the President from the public directors.”).

⁵⁸ The alternatives are for liquidation under the Bankruptcy Code. See PHELPS & RHODES, *supra* note 3, at 1.03[3]–[4]. See generally 11 U.S.C. §§ 101–1532 (2010); 15 U.S.C.A. § 78eee (2010) (“SIPC may, upon notice to a member of SIPC, file an application for a protective decree with any court of competent jurisdiction.”).

⁵⁹ Patrick M. Birney & Travis R. Searles, *Should Sipa Trustee Have Greater Power Than Chapter 7 Trustee to Pursue Third-Party Claims?*, AM. BANKR. INST. J., May 2012, at 30 (“The SIPA liquidation proceeding is typically commenced by SIPC filing an application with a federal district court for a protective decree after being alerted that a firm is in or is approaching financial difficulty.”) (internal quotation marks omitted).

⁶⁰ 15 U.S.C.A. § 78eee (2010) (“If the court issues a protective decree under paragraph (1), such court shall forthwith appoint, as trustee for the liquidation of the business of the debtor and as attorney for the trustee, such persons as SIPC, in its sole discretion, specifies. The persons appointed as trustee and as attorney for the trustee may be associated with the same firm. SIPC may, in its sole discretion, specify itself or one of its employees as trustee in any case in which SIPC has determined that the

customers], recovering and distributing customer property to [the debtor's] customers, and liquidating the assets of [the debtor] for the benefit of the estate and its creditors."⁶¹ A trustee under SIPA is given the same powers and authority as a trustee under the Code.⁶² Once a trustee is appointed, there are many issues to sort out: who are the customers of the broker-dealer,⁶³ what amounts are they entitled to,⁶⁴ and who received what and when?

A trustee's primary goal, which is oftentimes elusive,⁶⁵ is to make creditors whole.⁶⁶ First, money is provided by the trustee, in the form of cash or securities, to customers through the SIPC fund.⁶⁷ If customers claim they are entitled to more, they have to wait for the trustee to recover assets.⁶⁸ There are many ways to do

liabilities of the debtor to unsecured general creditors and to subordinated lenders appear to aggregate less than \$750,000 and that there appear to be fewer than five hundred customers of such debtor.").

⁶¹ Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, 429 B.R. 423, 426 (Bankr. S.D.N.Y. 2010) *aff'd sub nom. In re Madoff*, 848 F. Supp. 2d 469 (S.D.N.Y. 2012) *aff'd sub nom. In re Bernard L. Madoff Inv. Sec. LLC*, 740 F.3d 81 (2d Cir. 2014).

⁶² 15 U.S.C. § 78fff-1 (2010) ("[A] trustee shall be vested with the same powers and title with respect to the debtor and the property of the debtor, including the same rights to avoid preferences, as a trustee in a case under Title 11."). Additionally, a SIPA-appointed trustee has the following general authority to:

deliver securities to or on behalf of customers to the maximum extent practicable in satisfaction of customer claims for securities of the same class and series of an issuer; and subject to the prior approval of SIPC but without any need for court approval, pay or guarantee all or any part of the indebtedness of the debtor to a bank, lender, or other person if the trustee determines that the aggregate market value of securities to be made available to the trustee upon the payment or guarantee of such indebtedness does not appear to be less than the total amount of such payment or guarantee.

Id.

⁶³ See PHELPS & RHODES, *supra* note 3, at 20.06[2][b] ("[A] claimant is entitled to SIPA protection if he is a 'customer,' as that term is defined by SIPA in 15 U.S.C. § 78III(2).").

⁶⁴ *Id.* at 20.06[3] ("There are two competing methods for calculating an investor's Net Equity—the Net Investment Method and the Last Statement Method.").

⁶⁵ Donell v. Kowell, 533 F.3d 762, 776 (9th Cir. 2008) ("[A]ssets recovered after a collapsed Ponzi scheme typically are insufficient to satisfy claims by defrauded investors.").

⁶⁶ Hon. Steven Rhodes, *The Fiduciary and Institutional Obligations of A Chapter 7 Bankruptcy Trustee*, 80 AM. BANKR. L.J. 147, 218 (2006) ("The trustee's duty is to maximize the assets of the bankruptcy estate to allow maximum recovery for . . . creditors") (quoting *United States v. Sims*, 218 F.3d 948, 952 (9th Cir. 2000)).

⁶⁷ Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, No. 08-01789-BRL, slip. op. at 5 (Bankr. S.D.N.Y. Dec. 23, 2008) *available at* <http://www.madofftrustee.com/document/other/Docket%20No%200000012%20.PDF> ("ORDERED, that the Trustee be, and he hereby is, authorized to satisfy such customer claims and accounts (i) by delivering to a customer entitled thereto 'customer name securities,' as defined in 15 U.S.C. §78III(3); (ii) by satisfying a customer's 'net equity' claim, as defined in 15 U.S.C. §78III(11), by distributing on a ratable basis securities of the same class or series of an issue on hand as 'customer property,' as defined in 15 U.S.C. §78III(4), and, if necessary, by distributing cash from such customer property or cash advanced by SIPC, or purchasing securities for customers as set forth in 15 U.S.C. §78fff-2(d) within the limits set forth in 15 U.S.C. §78fff-3(a); and/or (iii) by completing contractual commitments where required pursuant to 15 U.S.C. §78fff-2(e) and SIPC's Series 300 Rules, 17 C.F.R. §300.300 et seq., promulgated pursuant thereto.").

⁶⁸ *How the Claims Process Works*, SIPC.ORG <http://www.sipc.org/cases-and-claims/how-the->

this,⁶⁹ but hunting down assets transferred away by the debtor is the first method.⁷⁰ The law provides, when someone received assets from a Ponzi scheme and knew of the fraud, he or she has to give it all back, within a statute of limitations.⁷¹ The law also provides, even if a party did not know of the fraud, he or she must give back the amount above principal.⁷² This process is known as the avoidance of fraudulent transfers, and colloquially called a claw back.⁷³

Second, the sale of assets is useful. However, in Ponzi schemes, few assets remain compared to the debt.⁷⁴ After pursuing claw backs, selling assets, and other

claims-process-works (last visited Oct. 1, 2014).

⁶⁹ In a typical SIPA liquidation, the accounts of the debtor are transferred to another securities firm. See Morse, *supra* note 50, at 34 (“When practicable, the trustee will use the funds advanced by SIPC to buy securities of the same class and series as those owed to the customer.”).

⁷⁰ See *e.g.*, Scholes v. Lehmann, 56 F.3d 750, 753 (7th Cir. 1995) (“[The receiver was only able to recover] \$12 million [at first,] consisting mainly of property [that the Ponzi scheme operator] had bought with money that he had siphoned from the corporations, which in turn had obtained the money from the sale of shares in the limited partnerships. The receiver [then] distributed the recovered funds to the investors in the Ponzi scheme who lost money, with the result that, thus far, each has recovered 40 percent of his losses.”).

⁷¹ The law says all payments made from a Ponzi scheme to an investor are subject to being returned to the trustee; however, “a transferee has a defense to avoidance to the extent that value was given in good faith.” COLLIER ON BANKRUPTCY, *supra* note 15, at 548.04. Lacking, this good faith, all money is required to be returned. See generally Mark A. McDermott, *Ponzi Schemes and the Law of Fraudulent and Preferential Transfers*, 72 AM. BANKR. L.J. 157 (1998).

⁷² McDermott, *supra* note 71 (“Amounts received in excess of the amounts investments, however, are uniformly held to be subject to recovery.”); see also Scholes, 56 F.3d at 757–758 (“The injustice in allowing [an investor] to retain his profit at the expense of the defrauded investors is avoided by insisting on commensurability of consideration. [The investor] is entitled to his profit only if the payment of that profit to him, which reduced the net assets of the estate now administered by the receiver, was offset by an equivalent benefit to the estate . . . [However, a] profit is not offset by anything; it is the residuum of income that remains when costs are netted against revenues . . . [Furthermore] [i]t is no answer that some or for that matter all of [the investor’s] profit may have come from “legitimate” trades made by the corporations. They were not legitimate. The money used for the trades came from investors gulled by fraudulent representations. [The investor in this case] was one of those investors, and it may seem “only fair” that he should be entitled to the profits on trades made with his money. That would be true as between him and [the debtor] . . . It is not true as between him and either the creditors or the other investors in the corporations. He should not be permitted to benefit from a fraud at their expense merely because he was not himself to blame for the fraud. All he is being asked to do is to return the net profits of his investment[—]the difference between what he put in at the beginning and what he had at the end.”).

⁷³ Scholes, 56 F.3d at 757 (“[A winning investor] should not be permitted to benefit from a fraud at [losing investors’] expense merely because he was not himself to blame for the fraud.”); see also, Jordan Maglich, *Up Next For ZeekRewards Ponzi Scheme Victims . . . Clawbacks?*, FORBES (Aug. 27, 2012, 8:33 AM), <http://www.forbes.com/sites/jordanmaglich/2012/08/27/up-next-for-zeekrewards-ponzi-scheme-victims-clawbacks/> (“A receivership is founded on principles of equity. Because the amount of assets ultimately available for distribution to victims is usually insufficient to satisfy the total amount of victim claims, the receiver is tasked with ensuring that any distribution treats similarly-situated victims alike. This includes ensuring that some victims do not receive or retain gains at the expense of other victims.”).

⁷⁴ Many Ponzi scheme operators, such as Charles Ponzi and Bernie Madoff, spent the money of investors on lavish lifestyles, so there are little actual securities sitting around for the benefit of creditors.

recovery methods,⁷⁵ it is not uncommon for customers to only get a percentage of their investment back. The trustee only has the power to recover money while standing in the shoes of the debtor; the Code generally does not provide standing for the trustee to pursue claims on behalf of creditors.⁷⁶ However, customers are obviously free to pursue their own legal actions against third parties who they believe aided or abetted fraud.

III. PICARD V. JPMORGAN

A. Madoff's Scheme

Madoff was born in 1938 in Queens, New York.⁷⁷ He started BLMIS in 1960, in his senior year of college at Hofstra.⁷⁸ He started out as a market maker and did fairly well.⁷⁹ In the 1970s, his firm developed cutting edge technology that made Madoff a name.⁸⁰ In the late 1980s, the market crashed. Many believe Madoff could have legitimately continued to return the high profits he boasted through that period.⁸¹ Most commentators agree, he began running a Ponzi scheme⁸² through a below-the-radar investment advisory business in the late 1980s.⁸³

⁷⁵ See generally TABB, *supra* note 6.

⁷⁶ “A chapter 7 trustee does not have standing to pursue *any* cause of action on behalf of the estate’s creditors.” Birney & Searles, *supra* note 59, at 30.

⁷⁷ HENRIQUES, *supra* note 1, at 31.

⁷⁸ *Id.*

⁷⁹ “Madoff securities was a well-known market maker, meaning he both bought and sold stocks, making his profit by selling for a few cents more per share than his purchase price.” HARRY MARAKOPOLOS, NO ONE WOULD LISTEN: A TRUE FINANCIAL 26 (Frank Casey et al. eds., 1st ed. 2010).

⁸⁰ “Madoff securities was a pioneer in electronic trading, enabling the company to more rapidly move large blocks of over-the-counter stocks.” *Id.*

⁸¹ “Madoff was one of the few broker-dealers who stayed open for business during the crash of 1987.” ERIN ARVEDLUND, TOO GOOD TO BE TRUE: THE RISE AND FALL OF BERNIE MADOFF, at Kindle Locations 986-87 (Portfolio Kindle ed. 2009).

⁸² When he pled guilty, Madoff said: “When I began my Ponzi scheme, I believed it would end shortly and I would be able to extricate myself and my clients from the scheme.” *Id.* at Kindle Locations 84–87.

⁸³ *Id.*:

[In] the 1980s and 1990s, more and more money was pouring in to Madoff’s illegitimate advisory operation [and] . . . Madoff continued to use the success of his legitimate firm to dupe his victims and the SEC. He would wave papers from the legitimate broker-dealer business in front of them to deceive them into thinking he was making real trades . . . [but] he was simply taking investors’ money, depositing [it into his account.] . . . and sending it back out to earlier investors . . . Although the advisory business was growing, it was illegal [because Madoff was a registered investment advisor,] so Madoff did not like to talk about it.

Id. at Kindle Locations 1374–84.

Too ashamed to show bad performance,⁸⁴ Madoff produced false trade reports and customer account statements.⁸⁵ Few within BLMIS knew what was really going on.⁸⁶ Investors saw high returns on their statements and kept their money with Madoff.⁸⁷ They had no idea the securities they thought they owned did not exist in their accounts.⁸⁸ When an investor asked to liquidate his or her account, Madoff would provide the money of another investor, touted as “profit.”⁸⁹ This is a classic Ponzi scheme,⁹⁰ and the key to maintaining it is to recruit new investors and convince as many current investors as possible to keep their money in and “accrue interest.”⁹¹

Madoff used an aura of financial sophistication⁹² to recruit new money, both directly and through feeder funds.⁹³ A feeder fund is “a fund that raises money

⁸⁴ HENRIQUES, *supra* note 1, at 93 (“It is the classic genesis of a Ponzi scheme on Wall Street. A money manager falls short of cash to cover some expense or placate some customer or deliver on some promise, and he steals a little money from client accounts. The rationale is that he will be able to pay off his theft before it is detected . . . More typically, the sum of stolen money grows much faster than the honest profits do, and the Ponzi scheme rolls on towards certain destruction.”).

⁸⁵ One author explained the Madoff scheme this way:

To perpetuate the fraud, Madoff would keep accounts for all of his investors and show them statements containing fictitious profits made from securities trades. But in reality, Madoff was not making any trades at all. He simply recruited individuals to invest in his firm, and then used their money to pay other investors when requests for distribution of ‘profits’ were made. Eventually, the money began to dry up as people began taking much more out than was coming in via new investments. In the end, the market that Madoff had dominated for decades finally destroyed him. The burst of the housing bubble in 2008 and the resultant global financial crisis spelled the end for [the Ponzi scheme]. The jig, as they say, was up.

Anthony Martucci, *Advocating for Asset Forfeiture in the Post-Madoff Era: Why the Government, Not A Bankruptcy Trustee, Should Be Responsible for Recovering and Redistributing Assets from Feeder Funds and Net Winners*, 63 CASE W. RES. L. REV. 599, 602–03 (2012) (citations omitted) (internal quotation marks omitted).

⁸⁶ For example, the London office of the Madoff operation was determined to be innocent of fraud and to not have been aware of the Ponzi scheme in the United States. Peter Lattman, *Case Against Madoff Sons Is Dismissed in London*, N.Y. TIMES, Oct. 19, 2013, <http://dealbook.nytimes.com/2013/10/18/madoffs-sons-cleared-in-london-trial/>.

⁸⁷ Martucci, *supra* note 85, at 603.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Martucci, *supra* note 85.

⁹¹ HENRIQUES, *supra* note 1, at 93 (“As long as most of his clients left their balances intact, ‘rolling over’ their reported profits and making few if any withdrawals, he could pay out the occasional disbursement from the flood of new money coming in.”).

⁹² For example, Madoff was chairman of the National Association of Securities Dealers Automated Quotations (NASDAQ) and donated generously to numerous charities and political campaigns. Building this aura is common to those running Ponzi schemes, who are more interested in building up their image than in sharing the details of how they are achieving their success. See Steven M. Davidoff, *Should Charities Repay Their Madoff Money?*, N.Y. TIMES, June 29, 2009, <http://dealbook.nytimes.com/2009/06/29/should-charities-repay-their-madoff-money/>.

⁹³ MARKOPOLOS, *supra* note 79, at 112 (“[The feeder funds] did nothing for their clients except shovel money directly to Madoff.”).

from investors and puts it into one or more other funds.⁹⁴ Feeder funds raising cash to invest with Madoff would proliferate [rapidly] . . . after 1990.”⁹⁵ The logic for using feeder funds is to both raise money and keep prying eyes of investors and regulators at arm’s length.⁹⁶

Many people had suspicions about Madoff; two in particular stand out. The first was Harry Markopolos. Markopolos, while working as a securities analyst at Rampart Investment Management in Boston, was asked to recreate Madoff’s methods.⁹⁷ At that time, Madoff was publicly saying he employed a split-strike-conversion strategy, but Markopolos could not replicate Madoff’s results and “saw no reason why Madoff would let his feeder funds reap the huge management fees while he got only the trading commissions. [Additionally, Markopolos] doubted there were enough index options in the world to hedge a portfolio as big as Madoff’s.”⁹⁸ Even more damning, Markopolos determined “Madoff had lost money in only three of the eighty-seven months between January 1993 and March 2000, while the S&P 500 had been down in twenty-eight of those months. . . . That would be equivalent to a major league baseball player batting .996.”⁹⁹

The second person was Erin Arvedlund, of *Barron’s Magazine*. In 2001, she wrote an article entitled “Don’t Ask, Don’t Tell: Bernie Madoff Attracts Skeptics in 2011.”¹⁰⁰ In the article, she mentioned Madoff’s fund seemed to always return a profit and unusually high interest.¹⁰¹ The article also pointed out the oddity of not charging management fees and Madoff’s unusual secrecy.¹⁰² Most condemning was this: “[T]hree option strategists for major investment banks told *Barron’s* they [could not] understand how Madoff churns out such numbers [using his strategy].”¹⁰³

⁹⁴ HENRIQUES *supra* note 1, at 58. When a Ponzi scheme goes bust, feeder fund customers typically have no claim against the estate because they were not “customers” of the debtor. *See generally* Diana B. Henriques, *Broader Pool of Madoff Victims to Benefit From Fund*, N.Y. TIMES, Nov. 18, 2013, http://dealbook.nytimes.com/2013/11/18/compensation-fund-set-for-feeder-fund-victims-in-madoff-scheme/?_r=0.

⁹⁵ HENRIQUES, *supra* note 1, at 58.

⁹⁶ *Id.* at 92. Madoff kept the feeder funds quiet because he was not a registered investment advisor. *Id.* “Behind closed doors . . . he was [] running an immensely large[] money management business, one that regulators knew nothing about.” *Id.* Madoff told those running the feeder funds to keep quiet about his name, thus avoiding scrutiny. *Id.*

⁹⁷ MARKOPOLOS, *supra* note 79, at 36 (“[Markopolos’ bosses] began pushing [him] hard to reverse engineer Madoff’s strategy so Rampart could market a product that would deliver similar returns.”).

⁹⁸ HENRIQUES, *supra* note 1, at 123.

⁹⁹ *Id.*

¹⁰⁰ Erin E. Arvedlund, *Don’t Ask, Don’t Tell: Bernie Madoff Attracts Skeptics in 2001*, BARRON’S (May 7, 2001), <http://online.barrons.com/article/SB989019667829349012.html>.

¹⁰¹ *Id.* (“[Madoff’s] returns have been so consistent that some on the Street have begun speculating that Madoff’s market-making operation subsidizes and smooths his hedge-fund returns.”).

¹⁰² *Id.* “What Madoff told us was, ‘If you invest with me, you must never tell anyone that you’re invested with me. It’s no one’s business what goes on here,’ says an investment manager who took over a pool of assets that included an investment in a Madoff fund.” *Id.*

¹⁰³ *Id.*

In 2008, investors needed liquidity, so they called in their money, and Madoff's inability to pay his liabilities became clear.¹⁰⁴ In 2009, he pled guilty to securities fraud¹⁰⁵ and was sentenced to 150 years in jail.¹⁰⁶ When he was exposed, the SIPC elected to manage the liquidation of BLIMS,¹⁰⁷ and it appointed Irving Picard, the most experienced SIPA trustee in the nation, as trustee.¹⁰⁸

B. Picard and Liquidation

Under SIPA, Madoff's customers¹⁰⁹ with approved claims received money or securities up to the statutory cap, and, if they claimed they were entitled to more, they had to wait for Picard to recover assets.¹¹⁰ Picard began by pursuing claw back suits, which collected a little over \$9 billion.¹¹¹ These actions recovered money from hundreds of individuals and organizations, including the financial institutions that would later be sued.¹¹² However, customer claims exceeded \$11 billion.¹¹³ Statutes of limitations, legal defenses to claw back suits, difficulty

¹⁰⁴ MARKOPOLOS, *supra* note 79, at 201–02. Madoff's primary customers were the feeder funds and in 2008, "Madoff's investors were desperate for cash to protect their investments and meet their growing client redemptions, and attempted to withdraw their money . . . more than \$7 billion . . . [and] [t]here was no possible way Madoff could cover all these requests . . ." *Id.*

¹⁰⁵ *In re Bernard L. Madoff Inv. Sec. L.L.C.*, 721 F.3d 54, 59 (2d Cir. 2013) *cert. denied*, (134 S. Ct. 2895 (U.S. 2014) ("In March 2009, Madoff [pled] guilty to securities fraud and admitted that he had used his brokerage firm, Bernard L. Madoff Investment Securities LLC ("BLMIS"), as a vast Ponzi scheme.").

¹⁰⁶ Diana B. Henriques & Jack Healy, *Madoff Goes to Jail After Guilty Pleas*, N.Y. TIMES, Mar 12, 2009, <http://www.nytimes.com/2009/03/13/business/13madoff.html?pagewanted=all>. For an interesting discussion of Ponzi scheme operator sentences, see Steven Rhodes, THE PONZI SCHEME BLOG, *Guest Blog: Why I Voted That Ponzi Scheme Perps' Sentences Are Too Long*, (Jan. 3, 2014) <http://www.theponzibook.blogspot.com/2014/01/guest-blog-why-i-voted-that-ponzi.html>.

¹⁰⁷ *S.I.P.C. Moves to Liquidate Madoff's Firm*, N.Y. TIMES, Dec. 15, 2008, http://dealbook.nytimes.com/2008/12/15/sipc-moves-to-liquidate-madoffs-firm/?_r=0; *Validity, Construction, and Application of Securities Investor Protection Act of 1970*, 23 A.L.R. Fed. 157 (2014) ("Upon its determination that a broker-dealer is in danger of failing to meet its financial obligations, and that the customers of the broker-dealer are in need of the protection of [SIPA], the SIPC may petition a Federal District Court for the appointment of a trustee and the liquidation of the broker-dealer's business.") (emphasis added) (citations omitted); see Annotation, *Validity, Construction, and Application of Securities Investor Protection Act of 1970*, 23 A.L.R. Fed. 157 (2014).

¹⁰⁸ Press Release, Securities Investor Protection Corporation, Liquidation Proceeding For Bernard L. Madoff Investment Securities LLC Undertaken By Securities Investor Protection Corporation, (Dec.15, 2008), available at <http://www.madofftrustee.com/document/news/000061-121508-sipc-madoff-filing-news-release-final.pdf>.

¹⁰⁹ Kathy B. Phelps, *Who Are the Victims in the Bernard Madoff Ponzi Scheme?*, THE PONZI SCHEME BLOG (Nov. 24, 2013), <http://www.theponzibook.blogspot.com/2013/11/who-are-victims-in-bernard-madoff-ponzi.html>.

¹¹⁰ John Wasik, *Is SIPC Doing Enough for Scam Victims?*, FORBES (Sep. 20, 2012, 12:38 PM), <http://www.forbes.com/sites/johnwasik/2012/09/20/is-sipc-doing-enough-for-scam-victims/>.

¹¹¹ *Building the Customer Fund*, THE MADOFF RECOVERY INITIATIVE (Jan. 1, 2014) http://www.madofftrustee.com/document/other/blmisRecovery1_24_14.pdf.

¹¹² *Recoveries to Date*, THE MADOFF RECOVERY INITIATIVE, <http://www.madofftrustee.com/recoveries-04.html> (last visited Feb. 22, 2014).

¹¹³ *SIPA Liquidation Claims Process*, THE MADOFF RECOVERY INITIATIVE, <http://www.madofftrustee.com/recoveries-04.html>.

tracking down all transfers, and legal fees limited full recovery.¹¹⁴ This being the case, Picard explored other avenues of recovery, so *Picard v. JPMorgan*¹¹⁵ began.

C. The Case of *Picard v. JPMorgan*

Picard sued JPMorgan, HSBC, UBS, and more than thirty other financial institutions,¹¹⁶ alleging they aided and abetted fraud, aided and abetted breach of fiduciary duty, were unjustly enriched by their relationship with BLMIS, and had committed fraud on the regulator.¹¹⁷ Under statutory and state law theories of contribution and tort, Picard sought \$2 billion.¹¹⁸ Most of these firms had already

madofftrustee.com/claims-03.html (last visited Feb. 22, 2014).

¹¹⁴ *Picard v. Katz*, 462 B.R. 447, 452 (S.D.N.Y. 2011), *abrogated by* *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. L.L.C.* (S.D.N.Y. 2014) (granting investor's motion to dismiss on the ground the shorter statute of limitation applied, in part because "undoing such large transfers involving so many customers from so long ago as 2002 would . . . have a substantial and [] negative effect on the financial markets") (internal quotation marks omitted) (internal citation omitted). Under the Uniform Fraudulent Transfer Act (UFTA), the statute of limitations is four years, and, under the Uniform Fraudulent Conveyance Act, the statute of limitations of the particular state governs, which ranges from three to six years. *TABB supra* note 6, at 587.

¹¹⁵ The citation to the consolidated case, which was heard by the Second Circuit and then appealed to the Supreme Court, is as follows: *In re Bernard L. Madoff Inv. Secs. LLC.*, 721 F.3d 54, 57 (2d Cir. N.Y. 2013). This is the consolidated case of two lower court cases: *Picard v. HSBC Bank PLC*, 454 B.R. 25 (S.D.N.Y. 2011) (Rakoff, J.) and *Picard v. JPMorgan Chase & Co.*, 460 B.R. 84 (S.D.N.Y. 2011) (McMahon, J.). It should be noted, Picard sued many financial institutions in addition to HSBC and JPMorgan; they were just the primary defendants for the caption.

¹¹⁶ *In re Bernard L. Madoff Inv. Secs. LLC.*, 721 F.3d at 62 (2d Cir. 2013) ("On July 15, 2009, the Trustee commenced an adversary proceeding in the United States Bankruptcy Court for the Southern District of New York against HSBC and thirty-six others, including UniCredit and Pioneer."). A few of the many other institutions were UniCredit, Pioneer Alternative Investment Management Ltd., UBS AG, et al., UniCredit Bank Austria AG., Access International Advisers, LLC, et al., Luxalpha Sicav, et al. These firms were represented by counsel at the Second Circuit.

¹¹⁷ *Picard*, 460 B.R. at 89–90 ("The Amended Complaint asserts common law damages claims for aiding and abetting fraud and breach of fiduciary duty, 'fraud on the regulator,' unjust enrichment, conversion, aiding and abetting conversion, knowing participation in a breach of trust, and contribution . . . The Trustee [also] alleges that the . . . Feeder Fund Defendants were aware that BMIS was likely engaged in fraud, but despite that knowledge sponsored two 'feeder funds' that invested heavily BMIS. UBS thereby lent the prestige of its name to the funds, and created the appearance of overseeing them. In reality, however, UBS delegated custodial and supervision functions to Madoff himself, ultimately helping Madoff attract additional European investors in BMIS, and willfully turning a blind eye in order to collect lucrative fees for servicing the funds. The Access Defendants are alleged to have joined in this scheme by marketing the feeder funds to investors, despite knowing, or consciously avoiding knowing, that BMIS was a fraud, and misrepresenting to investors that Access performed rigorous due diligence."); Floyd Norris, *JPMorgan Lost Madoff in a Blizzard of Paper*, N.Y. TIMES, Jan. 9, 2014, <http://www.nytimes.com/2014/01/10/business/madoffs-trail-lost-in-a-blizzard-of-paper.html>; Diana B. Henriques, *From Prison, Madoff Says Banks 'Had to Know' of Fraud*, N.Y. TIMES, Feb. 15, 2011, <http://www.nytimes.com/2011/02/16/business/madoff-prison-interview.html?pagewanted=all>.

¹¹⁸ Judge Jacobs, in his Second Circuit decision, summed up the claims: "[T]he complaints allege that, when the Defendants were confronted with evidence of Madoff's illegitimate scheme, their banking fees gave incentive to look away, or at least caused a failure to perform due diligence that would have revealed the fraud." *In re Bernard L. Madoff*, 721 F.3d at 57–58.

been party to fraudulent transfer suits.¹¹⁹

BLMIS's checking accounts resided with JPMorgan.¹²⁰ All told, over about twenty years, JPMorgan made approximately \$500 million from BLMIS in banking fees, investments, and interest.¹²¹ In 2006, twenty years into the relationship, Picard alleged JPMorgan's "Chief Risk Officer John Hogan learned at a lunch . . . 'there [was] a well-known cloud over the head of Madoff and [] his returns [were] speculated to be part of a [P]onzi scheme' . . . [but after] a Google search on Madoff . . . [returned nothing] . . . no further inquiries [were made]. . . ."¹²² In 2008, Picard said "[t]hough JPMorgan [and other financial institutions like UBS and HSBC were] uniquely positioned to put an end to Madoff's fraud, it . . . continued collecting its large fees."¹²³ UBS "reaped at least \$80 million in fees as it facilitated investments in BLMIS. . . ."¹²⁴ Picard left out the fact these companies lost money in the Madoff scheme as well.¹²⁵ Though he brought some claims on behalf of BLMIS, what made his case unique was he brought many claims on behalf of defrauded customers.¹²⁶

The cases were filed in the United States Bankruptcy Court in the Southern District of New York. The reference was withdrawn¹²⁷ and sent to the United States District Court.¹²⁸ The district courts dismissed on the grounds the trustee

¹¹⁹ Clawing back many of the transfers was likely barred by the statute of limitations, which states, "The trustee [of a partnership debtor] may avoid any transfer . . . of an interest of the debtor in property, or any obligation . . . incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition . . ." 11 U.S.C. § 548 (a)(1)(1994).

¹²⁰ *Picard*, 460 B.R. at 89 ("Madoff maintained a bank account with JPMorgan, referred to as the '703 Account,' through which he funneled the money coming into and going out of BMIS over the life of his scheme.").

¹²¹ *In re Bernard L. Madoff*, 721 F.3d at 59 ("Madoff maintained a checking account at JPMorgan Chase & Co. ('JPMorgan') for more than twenty years, beginning in 1986. In the years prior to BLMIS's bankruptcy, JPMorgan collected an estimated half billion dollars in fees, interest payments, and revenue from BLMIS.").

¹²² *Id.* at 60.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Brief in Opposition for HSBC & Unicredit Respondents at 5, *In Re Bernard L. Madoff*, 721 F.3d 54 (No. 13-448), 2013 WL 6665185, at *5 ("HSBC invested and lost nearly \$1 billion of its own money in funds that, in turn, invested their assets with BLMIS, which evidences HSBC's lack of knowledge of the fraud.").

¹²⁶ *Picard*, 460 B.R. at 90 (S.D.N.Y. 2011) ("[T]he Trustee seeks damages on behalf of BMIS's customers, rather than BMIS itself.").

¹²⁷ "Withdrawing the reference" is a jurisdictional matter of the bankruptcy court. The basic idea is bankruptcy courts have limited jurisdiction and expertise, which is why bankruptcy matters are "referred" to them, so some cases are sent back to the district court for resolution when the issues do not concern bankruptcy. See generally David I. Cisar & Christopher J. Schreiber, *Withdrawing the Reference, and Its Strategic Application in Bankruptcy Litigation*, 24 AM. BANKR. INST. J. 79 (2009).

¹²⁸ *In re Bernard L. Madoff*, 721 F.3d at 62 ("On a motion by the UniCredit entities, the district court withdrew the reference to the bankruptcy court, for the limited purpose of deciding two threshold issues: (1) the Trustee's standing to assert the common law claims, and (2) preemption of these claims by the Securities Litigation Uniform Standards Act.").

lacked standing to assert customer claims and the doctrine of *in pari delicto*¹²⁹ barred his BLMIS claims.¹³⁰ Picard appealed to the Second Circuit.¹³¹

IV. SECOND CIRCUIT OPINION

Judge Dennis Jacobs, writing for a three-judge panel, affirmed the district court decisions.¹³² His opinion as to *in pari delicto*¹³³ barring Picard's claims—the contribution issue¹³⁴—will not be covered because those conclusions applied to the

¹²⁹ See *infra* note 126.

¹³⁰ For a great summary of the reasoning in the district court, see *SDNY District Court Holds that Madoff Trustee Lacks Standing to Assert Common Law Claims Against Third Parties on Behalf of Madoff Customers*, MILBANK, TWEED, HADLEY & MCCLOY LLP (Aug. 9, 2011), <http://www.milbank.com/images/content/5/9/5996/Picard-v-HSBC-FRG-LitigationClient-Alert-08-08-2011.pdf>.

¹³¹ Brief for Plaintiff-Appellant, *Picard v. JPMorgan*, 11-5044-bk (2nd Cir. Feb. 16, 2012).

¹³² *In re Bernard L. Madoff*, 721 F.3d at 77.

¹³³ *In pari delicto*, under New York common law, boils down to the fact “one wrongdoer may not recover against another.” *Id.*; see also *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 464 (2010) (noting the public policy behind *in pari delicto*: “First, denying judicial relief to an admitted wrongdoer deters illegality. Second, *in pari delicto* avoids entangling courts in disputes between wrongdoers. As Judge Desmond so eloquently put it more than 60 years ago, ‘no court should be required to serve as paymaster of the wages of crime, or referee between thieves.’”) (internal citation omitted). As the trustee of a debtor stands in the shoes of the debtor, not the shoes of creditors, Jacobs ruled the doctrine applied to bar Picard's claims on behalf of BLMIS. *In re Bernard L. Madoff*, 721 F.3d at 63 (“The debtor's misconduct is imputed to the trustee because, innocent as he may be, he acts as the debtor's representative.”) (citing *Wight v. BankAmerica Corp.*, 219 F.3d 79, 87 (2d Cir.2000)). Within the Second Circuit, this is treated as an issue of standing and is known within that circuit as the *Wagoner* rule:

Under the Second Circuit's *Wagoner* Rule, a trustee representing the bankrupt estate does not have standing to bring claims for harm to a corporation caused by the corporation's illegal acts . . . The rationale underlying the *Wagoner* rule derives from the fundamental principle of agency that the misconduct of managers within the scope of their employment will normally be imputed to the corporation . . . Because management's misconduct is imputed to the corporation, and because a trustee stands in the shoes of the corporation, the *Wagoner* rule bars a trustee from suing to recover for a wrong that he himself essentially took part in.

Amelia T. Rudolph, Tracy K. Ledbetter & Kurt Lentz, *Invoking In Pari Delicto To Bar Accountant Liability Actions Brought By Trustees And Receivers*, ST004 ALI-ABA 75, 128-29 (2011) (citations omitted) (internal quotation marks omitted). Picard, in arguing for a reversal of the District Court's decision on this issue, first asserted, though BLMIS was a wrongdoer, he was not a wrongdoer, so *in pari delicto* should not apply. *In re Bernard L. Madoff*, 721 F.3d at 64. Jacobs shot this down by citing *Kirschner*, in which the doctrine was applied to a trustee under identical facts. *Id.* Second, he argued an exception to *in pari delicto*, the “adverse interest” exception, “which directs a court not to impute to a corporation the bad acts of its agent when the fraud was committed for personal benefit” should apply to him. *Id.* Jacobs disagreed, noting the exception only applied to cases of theft or embezzlement *against* a corporation. *Id.* In this case, it would be impossible to separate Bernie Madoff from the firm bearing his own name. Third, Picard argued the doctrine was not one of standing but should be decided on the merits. However, Jacobs cited *Wagoner*, which did exactly that. *Id.*

¹³⁴ Picard contended his claims of contribution for funds advanced by SIPA, brought under New York law, survived *in pari delicto* because parties seeking contribution are by definition *in pari delicto*.

BLMIS claims. The focus here is on customer claims because their legal backdrop presents a more interesting topic of discussion.

A. Standing

The district courts said, because a trustee sits in the shoes of the debtor, Picard did not have standing to sue third parties on behalf of customers.¹³⁵ Both sides agreed on what the general rule is, as to Article III standing: “To have standing, a plaintiff must (1) allege personal injury (2) fairly traceable to the defendant’s allegedly unlawful conduct[,] and (3) likely to be redressed by the requested relief.”¹³⁶ Additionally, the parties agreed as to the key prudential standing requirement: “A party must assert his own legal rights and interests.”¹³⁷

Jacobs began his opinion by noting the Supreme Court’s decision in *Caplin v. Marine Midland Grace Trust Co. of New York*¹³⁸ controlled.¹³⁹ In *Caplin*, the trustee of a corporate debtor brought suit against a trustee of outstanding debt, on behalf of the debt holders.¹⁴⁰ The Supreme Court ruled the corporate trustee, under the bankruptcy rules,¹⁴¹ did not have standing to bring suit on behalf of customers.¹⁴² The Court also made a valuable observation:

It is difficult to see precisely why . . . the trustee in reorganization should represent the interests of the debenture holders, who are capable of deciding for themselves whether or not it is worthwhile to seek to

In re Bernard L. Madoff, 721 F.3d at 65 (“The New York statute provides that ‘two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.’”). Though Jacobs noted this was Picard’s strongest argument under *in pari delicto*, it still failed because the New York statute required the party seeking compulsion to have been required to make a payment, under state law, to then seek contribution. Here, there was no state law mandate to pay monies, only a federal mandate. In Jacob’s opinion, the federal possibility of contribution was not sufficient to establish a state claim for contribution. *Id.* at 65–66 (“The source of a right of contribution under state law must be an obligation imposed by state law.”) (quoting *LNC Invs., Inc. v. First Fid. Bank*, 935 F.Supp. 1333, 1349 (S.D.N.Y.1996)).

¹³⁵ *Picard*, 460 B.R. at 91 (S.D.N.Y. 2011) (“[T]he Trustee lacks standing under the Bankruptcy Code, as incorporated into SIPA, to pursue claims that properly belong to creditors.”); *Picard v. HSBC Bank PLC*, 454 B.R. 25, 29 (S.D.N.Y. 2011) (“[E]ven though a bankruptcy trustee can seek to recover monies on behalf of the debtor’s estate that will ultimately be used to help satisfy creditors’ claims, it is settled law that the federal Bankruptcy Code (Title 11, United States Code) does not itself confer standing on a bankruptcy trustee to assert claims against third parties on behalf of the estate’s creditors themselves, because the trustee stands in the shoes of the debtor, not the creditors.”).

¹³⁶ *In re Bernard L. Madoff*, 721 F.3d at 66 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

¹³⁷ *Id.* at 58 (internal quotes omitted) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

¹³⁸ 406 U.S. 416 (1972).

¹³⁹ *In re Bernard L. Madoff*, 721 F.3d at 58.

¹⁴⁰ 406 U.S. at 416–21.

¹⁴¹ The trustee sued under “Chapter X of the Bankruptcy Act, 52 Stat. 883.” *Id.* at 416.

¹⁴² *Id.* at 434 (“[W]e conclude that petitioner does not have standing to sue an indenture trustee on behalf of debenture holders.”).

recoup whatever losses they may have suffered by an action against the [third-party] indenture trustee. [Furthermore] [a]ny suit by debenture holders would not affect the interests of other parties to the reorganization[, so i]t would seem, therefore, that the debenture holders, the persons truly affected by the suit . . . should make their own assessment of the respective advantages and disadvantages, not only of litigation, but of various theories of litigation.¹⁴³

Picard's first major standing argument was, though *Caplin* controlled, narrow exceptions existed, under *Redington v. Touche Ross & Co.*¹⁴⁴ and *St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.*¹⁴⁵—both Second Circuit decisions.¹⁴⁶ In *Redington*, a liquidating trustee sued the former accountant of the debtor broker-dealer for, among other things, violations of securities laws.¹⁴⁷ The district court dismissed the case, holding no private cause of action existed to enforce Section 17 of the Securities Act¹⁴⁸ and the court lacked subject matter jurisdiction over the common law claims.¹⁴⁹ The Second Circuit reversed, holding a private cause of action does exist when brought by customers.¹⁵⁰ The *Redington* court also held the trustee was the proper party to bring these suits because the SIPC was subrogated to the claims of customers, even claims against third parties.¹⁵¹

Judge Jacobs acknowledged the Second Circuit's disposition in *Redington* favored Picard but held *Redington* was no longer good law.¹⁵² He pointed out the Supreme Court reversed the Second Circuit's decision in *Redington* on a threshold issue, and, on remand, the Second Circuit could not find a basis for standing.¹⁵³ As such, "[t]he Supreme Court's reversal on the threshold question drained the Second Circuit *Redington* opinion of force on other questions."¹⁵⁴ Jacobs then noted any "half-life" *Redington* might have within the circuit¹⁵⁵ should be finally quashed

¹⁴³ *Id.* at 431.

¹⁴⁴ 592 F.2d 617, 619 (2d Cir. 1978) *rev'd*, 442 U.S. 560 (1979).

¹⁴⁵ 884 F.2d 688, 691 (2d Cir. 1989).

¹⁴⁶ Petition for Writ of Certiorari at 16–21, *Picard v. JPMorgan Chase & Co. (In re Bernard L. Madoff Inv. Sec. LLC)*, 721 F.3d 54 (2d Cir. 2013) (No. 13-448), 2013 WL 5555099, at *16–21.

¹⁴⁷ This note will be clear to say if the interpretation of a case is one held by Picard, the defendants, or Judge Jacobs. Absent such qualification, the summary of cases are that of the Author.

¹⁴⁸ *Redington v. Touche Ross & Co.*, 428 F. Supp. 483, 489 (S.D.N.Y. 1977) ("There is nothing explicit to show any legislative intent respecting a private claim under Section 17 [of the securities act].").

¹⁴⁹ *Id.* at 493 ("[T]he Trustee is a citizen of New York and is a plaintiff along with SIPC. Partners of Touche, the defendant, are citizens of New York. Thus, there is no complete diversity of citizenship . . .").

¹⁵⁰ *Redington*, 592 F.2d at 623–24 ("[W]e decide that brokers' customers have a right of action against accountants for certifications that violate the standard set by section 17 . . .").

¹⁵¹ *Id.* at 624 ("[W]e find that SIPC is subrogated to the right of action implied in section 17 in favor of brokers' customers against third parties such as accountants.").

¹⁵² *In re Bernard L. Madoff Inv. Sec. LLC*, 721 F.3d 54, 68 (2d Cir. 2013).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ This was Picard's argument.

because “[f]ollowing the Supreme Court’s reversal, this Court vacated its original judgment [in *Redington*] on the ground that subject matter jurisdiction was lacking.”¹⁵⁶ Jacobs was clear: “*Redington* should be put to rest; it has no precedential effect.”¹⁵⁷

Even if *Redington* was good law, Jacobs noted, first, the case was about a private right of action under a regulatory law, not about mass tort actions against third parties.¹⁵⁸ Second, *Redington* dealt with real parties in interest under FRCP 17(a) and, thus, was inapplicable in the current case.¹⁵⁹ Third, he pointed out *Redington* involved a single act by a single party, not analogous to the facts alleged by Picard.¹⁶⁰ Fourth and finally, Jacobs stressed *Redington* was about the actions of malfeasant managers who acted independent of company direction; the facts of *Redington* were not analogous to the case at hand, where Madoff used BLMIS as his personal fraud vehicle and piggy bank.¹⁶¹

Jacobs then turned to *St. Paul Fire*, a case Picard cited for the proposition a trustee may bring claims on behalf of creditors who are generalized in nature,¹⁶² as property of the estate.¹⁶³ *St. Paul* concerned, among other issues, claims brought by the trustee of the debtor corporation, on behalf of the debtor and unsecured creditors, against a third party.¹⁶⁴ That third party, at one point, had owned the parent company of the debtor.¹⁶⁵ In assessing whether the trustee had standing, the *St. Paul* court ruled “[i]f a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, [against an alter ego entity related to the debtor,] the trustee is the proper person to assert the claim.”¹⁶⁶

Jacobs saw *St. Paul* as distinguishable from *Picard*.¹⁶⁷ First, *St. Paul* was about whom the proper party was to bring a claim possessed by *both* the debtor and

¹⁵⁶ *In re Bernard L. Madoff*, 721 F.3d at 68.

¹⁵⁷ *Id.* at 69.

¹⁵⁸ *Id.* (“*Redington* considered chiefly whether the trustee and SIPC had standing to bring a cause of action under Section 17 of the Exchange Act; the opinion said nothing about a SIPA trustee’s ability to orchestrate mass tort actions against third parties.”).

¹⁵⁹ *Id.* (“Second, our holding in *Redington* turned, in part, on an analysis of Fed.R.Civ.P. 17(a), which sets forth rules concerning real parties in interest, and which has no application here.”).

¹⁶⁰ *Id.* (“*Redington* involved claims against a single accounting firm for a few discrete instances of alleged misconduct.”).

¹⁶¹ *Id.* at 69.

¹⁶² *St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 701 (2d Cir. 1989). “If a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim . . .” *Id.*

¹⁶³ *Id.* at 700. (“[I]f a cause of action is property of the debtor, the Bankruptcy Code explicitly gives the trustee the right to assert it on behalf of the estate.”).

¹⁶⁴ *Id.* at 690–92.

¹⁶⁵ *Id.* at 701. (“[H]ere it is Banner, the alleged alter ego, rather than the bankruptcy trustee that is contesting PepsiCo’s assertions, and that the bankruptcy trustee has apparently not moved to stay these proceedings or to intervene in this case.”).

¹⁶⁶ *Id.*

¹⁶⁷ *In re Bernard L. Madoff Inv. Sec. LLC.*, 721 F.3d 54, 70 (2d Cir. 2013).

creditors.¹⁶⁸ In the *Picard* case, creditors alone held the claims.¹⁶⁹ Second, to read *St. Paul* as conferring standing on trustees to sue third parties would conflict with Second Circuit law.¹⁷⁰ Third, Jacobs noted Picard’s claims, on behalf of customers were in no sense of the word “general,” rather the “claims [in the case were brought] on behalf of thousands of customers against third-party financial institutions for their handling of individual investments made on various dates in varying amounts.”¹⁷¹ In sum, the Second Circuit held the law of the circuit did not provide exceptions to the rule under *Caplin*—a trustee does not have standing to assert claims on behalf of creditors.¹⁷²

Picard’s second major standing argument was SIPA conferred standing upon a trustee by creating a bailment relationship between the trustee and customers.¹⁷³ He asserted the same was true under common law.¹⁷⁴ To this SIPA-bailment argument, Jacobs said a SIPA trustee is generally limited to the powers of a bankruptcy trustee, and a bankruptcy trustee is not allowed to bring claims on behalf of creditors.¹⁷⁵ Jacobs noted, though a SIPA trustee does possess additional powers, “[n]owhere does [SIPA] reference bailment, or characterize customers as ‘bailors’ or trustees as ‘bailees,’ or in any way indicate that the trustee is acting as bailee of customer property.”¹⁷⁶ The Second Circuit rejected the SIPA-bailment argument.¹⁷⁷

As to common law bailment, Jacobs noted a bailment relationship is established when one party places property into the hands of another.¹⁷⁸ During that time, the party entrusted with property has certain rights as to that property.¹⁷⁹ In the *Picard* case, customers gave property to BLMIS, and the minute Picard took

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* (“The Trustee’s broad reading of *St. Paul* would bring the Court’s holding into conflict with a line of cases that came before and after it.”).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Brief for Trustee-Appellant Irving H. Picard, As Trustee for the Substantively Consolidated Sipa Liquidation of Bernard L. Madoff Investment Securities LLC & Bernard L. Madoff, at 26–27, *In re Bernard Madoff Inv. Secs. LLC.*, 721 F.3d 54 (2d Cir. 2013) (11-5175-bk) 2012 WL 626191 at *20. (“As a bailee, a SIPA trustee has the right to sue any wrongdoer whom [the customers] could sue themselves. Under the law of bailment, a bailee can vindicate harm to the bailed property based on his possessory interest.”) (citations omitted) (internal quotation marks omitted).

¹⁷⁴ *Id.*

¹⁷⁵ *In re Bernard L. Madoff*, 721 F.3d at 71. “As a general rule, SIPA vests trustees with ‘the same powers and title with respect to the debtor and the property of the debtor . . . as a trustee in a case under Title 11.’” *Id.* (citing 15 U.S.C. § 78fff-3(a)(1) (2010)).

¹⁷⁶ *Id.* at 72.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* “A bailment is ‘a delivery of personalty for some particular purpose, or on mere deposit, upon a contract express or implied, that after the purpose has been fulfilled it will be redelivered to the person who delivered it, or otherwise dealt with according to that person’s directions, or kept until it is reclaimed.’” *Id.* (citing 9 N.Y. Jur. 2d Bailments and Chattel Leases § 1 (West 2013)).

¹⁷⁹ See generally 8 C.J.S. Bailments § 4 (2014).

control of BLMIS as trustee, the property became impaired in bankruptcy.¹⁸⁰ In other words, no bailment existed because “any supposed bailment pre-dated Picard’s appointment.”¹⁸¹ Additionally, Jacobs noted Picard’s obligation was to return property to the debtor, not customers, so bailment did not exist.¹⁸² Finally, in response to the claim BLMIS was the bailee and Picard represented BLMIS, Jacobs replied: a “thief is not a bailee of stolen property.”¹⁸³ In sum, the Second Circuit affirmed the district court’s standing decision.

B. Subrogation

Picard next argued the subrogation provisions in SIPA provided a trustee with standing to sue third parties.¹⁸⁴ According to Picard, when the SIPC advances funds to customers, it becomes subrogated to *the entirety* of their claims—those that even remotely relate to the debtor.¹⁸⁵ Picard’s argument stemmed from 15 U.S.C. § 78fff-3, which states in relevant part:

To the extent moneys are advanced by SIPC to the trustee to pay or otherwise satisfy the claims of customers, in addition to all other rights it may have at law or in equity, SIPC shall be subrogated to the claims of such customers . . . except that SIPC as subrogee may assert no claim against customer property until after the allocation thereof to customers as provided in section 78fff-2(c) of this title.¹⁸⁶

Picard argued his suit fell under SIPC’s subrogation rights “at law or in equity.”¹⁸⁷

Jacobs’s began his discussion of the subrogation issue by asserting Picard’s view of the statute was wrong:

¹⁸⁰ *Id.*

¹⁸¹ *In re Bernard L. Madoff*, 721 F.3d at 72.

¹⁸² *Id.* at 72–73 (“Picard’s claims are intended to augment the general fund of customer property so that it can be distributed ratably based on customers’ net equity. This arrangement is not an analog to a bailment, in which the bailee is entrusted with an item that is to be recovered by the bailor at some later time.”).

¹⁸³ *Id.* at 73.

¹⁸⁴ *Id.* at 58. Though this section on subrogation could technically go under the topic of standing, it is more appropriate as its own heading because the basis of the argument was subrogation, which would have the effect of conferring standing.

¹⁸⁵ Petition for Writ of Certiorari at 23, *In re Bernard L. Madoff Inv. Secs. LLC.*, (2013) (No. 13-448), 2013 WL 5555099, at *23. Picard’s argument is best summed by this comment: “SIPC became subrogated to customers’ claims against Madoff’s enablers and abettors when it provided advances for losses that they helped to bring about. Accordingly, the Trustee, to whom SIPC assigned its claims, is entitled to step into the shoes of BLMIS’s customers and attempt to recover the funds that it advanced to compensate for others’ malfeasance.” *Id.*

¹⁸⁶ 15 U.S.C. § 78fff-3 (2010).

¹⁸⁷ Petition for Writ of Certiorari at 23, *In re Bernard L. Madoff Inv. Secs. LLC.*, (2013) (No. 13-448), 2013 WL 5555099, at *23.

It is undisputed that the phrase “claims of customers” refers (as throughout the statute) to customers’ *net equity* claims against the estate.¹⁸⁸ SIPA thus allows only a narrow right of subrogation—for SIPC to assert claims against the fund of customer property and thereby recoup any funds advanced to customers once the SIPA trustee has satisfied those customers’ net equity claims.¹⁸⁹

In other words, after SIPA gives defrauded customers their money, SIPA has a right to collect that money from the estate, not from third parties. Jacobs also noted there is no indication, when Congress added the language “in addition to all other rights it may have at law or in equity” in 1978, it intended to expand the powers of the trustee—there was “no sign that Congress intended an expansive increment of power to SIPA trustees.”¹⁹⁰ Additionally, he noted the Chairman of the SIPC at the time commented, “claims of SIPC as subrogee (except as otherwise provided), should be allowable *only as claims against the general estate.*”¹⁹¹

Strengthening his argument, Jacobs also pointed out *Caplin* was decided *before* the revision of SIPA in 1978.¹⁹² *Caplin* held a trustee did not have standing to sue on behalf of customers, so if Congress had intended in 1978 to overturn the Supreme Court with the above language, it would have made this intention clear.¹⁹³ Furthermore, the Court in *Caplin* was not shy to say Congress could establish trustee standing to sue third parties.¹⁹⁴ Jacobs noted legislation cannot be read as if Congress intended to hide an elephant in a mouse hole.¹⁹⁵ Driving a nail into the coffin of Picard’s argument, Jacobs finally noted the SIPC suggested the “at law or equity” language to Congress, and even explained the purpose was to “make clear that SIPC’s subrogation rights under the 1970 Act are cumulative with whatever

¹⁸⁸ *In re Bernard Madoff Inv. Secs. LLC.*, 721 F.3d 54, 74 (2d Cir. 2013) (emphasis added) (citations omitted).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* (citing *Report to the Board of Directors of SIPC of the Special Task Force to Consider Possible Amendments to SIPA* 12 (July 31, 1974) Letter of Transmittal, Recommendation II.A.9); see also *SIPA Amendments of 1975: Hearings on H.R. 8064 Before the Subcomm. on Consumer Protection and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 94th Cong. 64 (1976) [hereinafter *Hearings on H.R. 8064*].

¹⁹² *Id.*

¹⁹³ *In re Bernard L. Madoff*, 721 F.3d at 75 (“If Congress sought to exempt SIPA trustees from *Caplin*’s rule and expand SIPC’s subrogation rights to tort actions against third parties, we would expect such intent to be manifested in the statutory wording and in the record.”).

¹⁹⁴ *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 434 (1972). (“[W]e conclude that petitioner does not have standing to sue an indenture trustee on behalf of debenture holders. This does not mean that it would be unwise to confer such standing on trustees in reorganization. It simply signifies that Congress has not yet indicated even a scintilla of an intention to do so.”).

¹⁹⁵ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001) (“Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions[—]it does not, one might say, hide elephants in mouseholes.”); Rebecca M. Kysar, *Statutory Interpretation: How Much Work Does Language Do?: Penalty Default Interpretive Canons*, 76 BROOKLYN L. REV. 953, 963 (2011) (“[I]f a statutory interpretation would significantly change the existing legal landscape, a lack of congressional debate on the issue is evidence that Congress did not intend that interpretation.”).

rights it may have under other State or Federal laws.”¹⁹⁶ Therefore, the language was *not* intended to create new causes of action, as Picard asserted.¹⁹⁷

C. Insurance Law

Picard also argued, in the insurance law context, insurers can sue third parties on behalf of the insured customer.¹⁹⁸ As the SIPC functions as an insurer, he argued the same principles should apply.¹⁹⁹ Jacobs acknowledged the appeal of this argument but held courts should “avoid engrafting common law principles onto a statutory scheme unless Congress’s intent is manifest.”²⁰⁰ This conclusion was supported by the fact the SIPC fund is not insurance.²⁰¹

D. Equity and Public Policy

In the vein of equity and customer-centric public policy, Picard argued, “unless he [could] spearhead the litigation on behalf of defrauded customers, the victims [would] not be made whole, SIPC [would] be unable to recoup its advances, and third-party tortfeasors [would] reap windfalls.”²⁰² In addition, he asserted it was inequitable to allow financial institutions to keep the money they made from Madoff at the expense of innocent investors who essentially supplied that money.²⁰³ While again acknowledging the appeal of Picard’s argument, Jacobs held “equity has its limits; it may fill certain gaps in a statute, but it should not be used to enlarge substantive rights and powers.”²⁰⁴ Jacobs also noted many practical hurdles and unanswered questions stood in the way of granting a trustee the power to sue third parties on behalf of customers:²⁰⁵ Would such suits prevent

¹⁹⁶ *In re Bernard L. Madoff*, 721 F.3d at 75.

¹⁹⁷ *Id.* (“There is no sign that Congress intended an expansive increment of power to SIPA trustees.”).

¹⁹⁸ 6af-174f Appleman on Insurance § 4051 (2014).

¹⁹⁹ Petition for Writ of Certiorari at 23, *In re Bernard L. Madoff Inv. Secs. LLC.*, (2013) (No. 13-448), 2013 WL 5555099, at *23.

²⁰⁰ *In re Bernard L. Madoff*, 721 F.3d at 76.

²⁰¹ *Id.* “While this Court has referred to SIPC as providing a form of public insurance, it is clear that the obligations imposed on an insurance provider under state law do *not* apply to this congressionally-created nonprofit membership corporation.” *Id.* (citing *In re Bernard L. Madoff Inv. Sec. LLC*, 654 F. 3d 229, 239 (2d Cir. 2011)). In addition, Jacobs commented; “The clearest Congressional intent here is that we should treat SIPA as a bankruptcy statute, not as an insurance scheme.” *Id.*

²⁰² *Id.*

²⁰³ Brief for Trustee-Appellant Irving H. Picard, As Trustee for the Substantively Consolidated Sipa Liquidation of Bernard L. Madoff Investment Securities LLC & Bernard L. Madoff at 11, *In re Bernard L. Madoff*, 721 F.3d 54 (No. 11-5044), 2012 WL 626186 at *11 (“By virtue of its relationship with Madoff, JPMC reaped rewards in the hundreds of millions of dollars, leaving the customers to suffer the devastating consequences.”). “[W]hen the collapse of Madoff’s scheme became imminent, JPMC silently liquidated its position, leaving its clients and BLMIS’s customers holding the bag.” *Id.* at 6.

²⁰⁴ *In re Bernard L. Madoff*, 721 F.3d at 76.

²⁰⁵ *Id.* at 77 (“Would such suits prevent customers from ‘mak[ing] their own assessment of the

customers from bringing their own; would customers have input on strategy and settlement; who would be bound by judgments; and how would inconsistent judgments be handled?²⁰⁶ The Second Circuit, like the Supreme Court in *Caplin*, thought these issues should be left to Congress.²⁰⁷ In sum, “Picard’s scattershot responses [to the district court] are resourceful, but they all miss[ed] the mark.”²⁰⁸

V. ANALYSIS OF PICARD’S WRIT

Picard appealed to the United States Supreme Court.²⁰⁹ In his briefs, he made a number of arguments for why the Court should hear the case and for why the Second Circuit should be overturned.²¹⁰ Picard’s appeal can be boiled down to three arguments.²¹¹ First, a circuit split exists on the issue of the standing of a SIPA trustee, under subrogation, to sue on behalf of creditors.²¹² Second, a circuit split exists on the issue of state and federal contribution law.²¹³ Third, there is a

respective advantages and disadvantages, not only of litigation, but of various theories of litigation’? Can a SIPA trustee control customers’ claims against third parties if SIPC has not fully satisfied the customers’ claims against the estate? How would inconsistent judgments be avoided, given that ‘independent actions are still likely because it is extremely doubtful that [the parties] would agree on the amount of damages to seek, or even on the theory on which to sue’? Who would be bound by a settlement entered into by either the Trustee or by each customer who brings suit?’) (alteration in original) (citations omitted) (quoting *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 431–32 (1972) (citing *Caplin*)).

²⁰⁶ *Id.*

²⁰⁷ *Id.* (“[I]t is better to leave these intractable policy judgments to Congress.”).

²⁰⁸ *Id.* at 64.

²⁰⁹ Petition for Writ of Certiorari, *supra* note 146, at 1. In a bankruptcy proceeding, the trustee does not typically represent herself in court but hires counsel to do so. This case is no exception and the writ was filed by Picard’s attorneys at BakerHostetler, LLP. *Id.* at i. This is why the writ refers to “the Trustee” in the third person. *Id.*

²¹⁰ Reply Brief of Petitioner, *In re Bernard L. Madoff*, 721 F.3d 54 (No. 13-448), 2013 WL 6729877; Petitioner’s Supplemental Brief in Response to the Brief for the United States as Amicus Curiae, *In re Bernard L. Madoff*, 721 F.3d 54 (No. 13-448), 2014 WL 2506623. This note will not be able to cover each and every argument made by Picard and the defendants in their multiple briefs submitted to the court. This note will focus on the arguments asserted by Picard that appear to be of the highest merit, as well as the counter-arguments with the most merit. See *infra* Part V.A–C.

²¹¹ Reply Brief of Petitioner, *supra* note 210.

²¹² *Id.* at 2.

²¹³ Petition for Writ of Certiorari, *supra* note 146, at 6. As this topic will not be covered, a brief summary of the arguments is appropriate. Picard asserted he had a valid contribution claim because federal law did not preempt his state law claims. *Id.* Additionally, he made the argument the Second Circuit erred by not undertaking that analysis. *Id.* at 9. Picard cited two cases for the proposition other circuits apply a preemption analysis in this context: *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101 (4th Cir. 1989), and *Travelers Casualty & Surety Co. of America v. IADA Services*, 497 F.3d 862 (8th Cir. 2007). Petition for Writ of Certiorari, *supra* note 146, at 6–7. Defendants responded with four strong arguments. Supplemental Brief for Respondents, *In re Bernard L. Madoff*, 721 F.3d 54 (No. 13-448), 2014 WL 2621859. First, the issue of preemption was not raised below, and so should not be heard by the Court. Brief for the United States as Amicus Curiae at 9–10, *In re Bernard L. Madoff*, 721 F.3d 54 (No. 13-448), 2014 WL 2191242, at *9–10. They pointed out the Supreme Court is “a court of review, not of first view,” so the issue is inappropriate. Brief for the United States as Amicus Curiae, *supra*, at 10. Also, the court in *Northwest Airlines v. Transport Workers Union of America*, 451 U.S. 77

circuit split as to a trustee's standing under the Bankruptcy Code to bring claims on behalf of creditors.²¹⁴ The contribution argument applied to claims brought on behalf of BLMIS, so it will not be considered here.²¹⁵ Picard's writ asserted the Second Circuit interpreted the law too narrowly, and, thus, was on the losing side of each issue.²¹⁶ He also argued the Second Circuit's decision adversely impacted investors and hindered SIPC's ability to do its job.²¹⁷ Also, his writ asserted the scale of Madoff's fraud made the case worthy of review,²¹⁸ and the Madoff case has long-term implications on SIPA and the SIPC.²¹⁹ His writ is long on creativity, customer-centric public policy, and equity but short on the law. Additionally, Picard does not contemplate the costly impacts his interpretation of the law would have on the financial services industry—a cost that would no doubt trickle down to investors. The Court has yet to decide whether to hear the case.²²⁰

A. Subrogation

1. Picard's Circuit Split Argument

As in the Second Circuit, Picard argued, when SIPC advanced more than

(1981), was clear that “a right to contribution under state law [exists] in cases in which state law supplied the appropriate rule of decision.” *Id.* at 12–13. Here, the case arose under federal law, SIPA, so the rules of the state do not apply. *Id.* at 9. Second, even if federal law did not bar the state law claim, the New York doctrine of *in pari delicto* does. *Id.* Third, there is no conflict between the circuits on this issue, so hearing the issue is not worth the court's time. *Id.* Fourth and finally, there is no reoccurring importance in regards to this narrow issue. *Id.*

²¹⁴ Reply Brief of Petitioner, *supra* note 210, at 10.

²¹⁵ *Id.* at 9. This is not to say there are not great implications of a trustee's ability to sue third parties on behalf of the debtor; however, the more interesting issue concerns standing to sue on behalf of customers.

²¹⁶ Petition for Writ of Certiorari, *supra* note 146, at 3.

²¹⁷ *Id.*

²¹⁸ Reply Brief of Petitioner, *supra* note 210, at 1 (“Few petitions raise issues so weighty as those here. Supported by a cadre of leading financial institutions, Bernard Madoff defrauded his customers of nearly \$20 billion. While those institutions reaped profits for aiding Madoff's fraud, his customers suffered incalculable injuries beyond those to their finances and livelihoods. This case is an essential part of the Trustee's effort to recover what was lost. It would be worthy of consideration on that basis alone.”).

²¹⁹ *Id.* (“Respondents' view of the law, which prevailed below, will permanently hobble SIPC and SIPA trustees from carrying out their duty to make whole the customers of failed brokerages.”).

²²⁰ That is as of this writing, in February of 2014. The process for the Solicitor General to provide an opinion is:

[B]oth sides will . . . meet with the solicitor general in an attempt to receive his office's support. The SG . . . has complete discretion to recommend [that] the cert petition be granted or denied, to submit a brief that takes no position on cert, or to decline altogether the court's invitation to submit a brief.

Alison Frankel, *Why Does SCOTUS Want SG View on Madoff Trustee Suits vs Bank Enablers?*, REUTERS (Jan. 15, 2014), <http://blogs.reuters.com/alison-frankel/2014/01/15/why-does-scotus-want-sg-view-on-madoff-trustee-suits-vs-bank-enablers/>.

\$800 million to customers of BLIMS, it became subrogated to the entirety of their claims.²²¹ He began by noting two cases purportedly conflict with the Second Circuit's decision: *Appleton v. First National Bank of Ohio*²²² and *Securities and Exchange Commission v. Albert & Maguire Securities Co.*²²³

Appleton involved a SIPA trustee who sued third party banks to recover funds that had been wrongfully accepted by them.²²⁴ The district court dismissed for lack of standing, but the Sixth Circuit reversed, noting, "based on *Redington* [from the Second Circuit] and the 1978 amendment to § 78fff-3(a) . . . a right of subrogation exists on behalf of customers whose claims have been paid by the SIPC against third parties."²²⁵ This argument—the language of 78fff-3(a) confers standing—is arguably Picard's strongest.²²⁶

As the defendants point out, Picard is wrong on *Appleton* because that case was not well-reasoned or correctly decided.²²⁷ Not only did the court in *Appleton* not cite the legislative history of the 1978 SIPA amendments,²²⁸ but it also relied almost exclusively on a mistaken reading of *Redington* and failed to recognize the Second Circuit had vacated *Redington*.²²⁹ Furthermore, the fact the Second Circuit in the *Picard* case confirmed *Redington* has no value also drained the *Appleton* decision of authority.²³⁰ Finally, even assuming *Appleton* was good law, it is not analogous.²³¹ *Appleton* involved a situation akin to a fraudulent transfer, and a

²²¹ Petition for Writ of Certiorari, *supra* note 146, at 19 ("When SIPC provided more than \$800 million for advances to BLMIS customers, it obtained a right of subrogation to their claims by operation of statute and equity. 15 U.S.C. § 78fff-3(a). The Second Circuit's decision disregards that right, compromising the SIPA regime, while allowing parties that profited from the looting of investors' assets to pass the buck to SIPC and SIPA trustees.")

²²² 62 F.3d 791 (6th Cir. 1995).

²²³ 560 F.2d 569 (3d Cir.1977).

²²⁴ *Appleton*, 62 F.3d at 795 ("[The bank] deposited a total of 165 checks . . . with a combined face value of approximately \$3.1 million . . . Some of the checks so deposited bore no indorsement.")

²²⁵ *Id.* at 800.

²²⁶ Adam Agatston, *Drawing the Line for Ponzi Scheme Victims*, COLUM. BUS. L. REV. (Nov. 4, 2013, 11:27 PM), <http://cblr.columbia.edu/archives/12900>.

²²⁷ Brief in Opposition for HSBC & Unicredit Respondents, *supra* note 125, at 10–12.

²²⁸ *Id.* This is not to say legislative history is required. See generally Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 MARQ. L. REV. 161 (1996).

²²⁹ Brief in Opposition for HSBC & Unicredit Respondents, *supra* note 125, at 11.

²³⁰ *Id.* at 10 ("Any tension between the Second Circuit's decision below and *Appleton* . . . stems from *Appleton*'s erroneous view of the law in the Second Circuit. *Appleton*'s misconception of Second Circuit law has been [put] to rest by the decision below.")

²³¹ *Id.* at 12 ("[T]he trustee's claims in *Appleton* sought only recovery of the specific amounts of the wrongfully deposited checks at issue, not recovery of unparticularized damages for purported third-party torts. Moreover, those claims were expressly limited to the amounts of the SIPA advances the customers had received: [e]ach of the checks was the subject of a claim in the liquidation, and each was satisfied within the limits of [SIPA]'s protection. Here, by contrast, petitioner seeks to initiate class-action lawsuits and assert any number of tort claims against third parties on customers' behalf, [—]a project entirely unmoored from SIPA's language and purpose [—]and claims a right to recover billions of dollars in damages that dwarf the total amount of SIPA advances actually paid to customers of BLMIS. *Appleton* recognized no such right of action.") (alteration in original) (citations omitted)

direct connection existed between the funds on deposit at the bank and customers.²³²

As to the Third Circuit's decision in *Albert & Maguire*, that case involved monetary claims assigned by a defrauded customer to a bank and concerned what priority that bank should have in liquidation.²³³ Picard cited the following language: "[T]he trustee and SIPC stand not in the shoes of the debtor . . . but, rather, in those of the customer."²³⁴ The problem with Picard's assertion is this quote is dicta.²³⁵ The key language, which precedes the quote, states "[i]f the bankruptcy court believed that too much delay would be involved . . . it *might* have allowed the trustee to purchase securities" and then exercise claims.²³⁶ The key language here is "might," and confirms the fact the court in *Albert & Maguire* was entertaining a hypothetical. This language, from a 1977 case,²³⁷ has no precedential value.²³⁸ Additionally, even if *Albert & Maguire* had precedential value, that case dealt with an assignment.²³⁹ In sum, as the defendants point out, the only conflict that existed as to this issue was *within* the Second Circuit, concerning *Redington*, and that conflict has been resolved.²⁴⁰

Picard then argued the language of SIPA, specifically the "at law or in equity" section, was added by Congress to create a cause of action for trustees to assert on behalf of customers.²⁴¹ His logic was Congress legislates within the context of common law, such as insurance law, so Congress incorporated common law into the statute.²⁴² There are many problems with his argument. First, as the defendants point out, without explicit language, statutes should not be read to alter fundamental regulatory schemes.²⁴³ The defendants quoted the Supreme Court:

(internal quotation marks omitted).

²³² *Id.*

²³³ Sec. and Exch. Comm'n v. *Albert & Maguire Sec. Co.*, 560 F.2d 569, 570 (3d Cir. 1977) ("A bank receiving an assignment of a customer's claim in a Securities Investor Protection Act liquidation may not be entitled to assume that preferred status when the equities are contraindicative. After a review of the circumstances in this, a case of first impression, we conclude that the district court did not err in relegating the Bank's claim to that of a general creditor . . .").

²³⁴ *Id.* at 574.

²³⁵ Brief in Opposition for HSBC & Unicredit Respondents, *supra* note 125, at 13.

²³⁶ *Albert & Maguire*, 560 F.2d at 573 (emphasis added).

²³⁷ Brief in Opposition for HSBC & Unicredit Respondents, *supra* note 125, at 14.

²³⁸ *Id.* It should be noted "[s]tare decisis does not attach to such parts of the opinion of a court as are mere dicta." *BALLENTINE'S LAW DICTIONARY* (3d ed. 2010).

²³⁹ No assignment existed in the *Picard* case.

²⁴⁰ Brief in Opposition for HSBC & Unicredit Respondents, *supra* note 125, at 20 ("[T]he Second Circuit's comprehensive decision merely resolved a lingering dispute *within* its jurisdiction.").

²⁴¹ Petition for Writ of Certiorari, *supra* note 146, at 23 ("[A]s several courts of appeals recognized in the 1970s, SIPC is a classic subrogee under common law. And Congress ratified that view when it amended SIPA to expressly provide a statutory sub-rogation right while specifically preserving "all other rights [SIPC] may have at law or in equity.") (citing 15 U.S.C. § 78fff-3(a) (2012); see H.R. 8331, 95th Cong. (1978)) (citations omitted) (internal quotation marks omitted).

²⁴² Petition for Writ of Certiorari, *supra* note 146, at 22–23.

²⁴³ See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

“Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”²⁴⁴ Second, not only is there an absence of legislative history indicating the language was added for the purpose Picard indicates, but there is legislative history showing the language was added to ensure SIPC had the right to bring suits against those who had injured the SIPC, not customers.²⁴⁵

Picard’s final subrogation argument was the importance of the Madoff case meant the Court should hear it.²⁴⁶ He asserted, by not allowing SIPC to recoup all of its funds, the Second Circuit had prohibited it from doing its job.²⁴⁷ The problem here is Congress never envisioned the SIPC would be fully reimbursed for its outlays in each case.²⁴⁸ Furthermore, the SIPC has many ways to increase funds without pursuing litigation.²⁴⁹ Additionally, the fact the Second Circuit ruled the trustee cannot pursue third parties does not mean SIPC’s subrogation rights to collect money it fronts to customers is in any way limited; the Second Circuit’s decision does not prevent the SIPC from doing its job.²⁵⁰

2. Subrogation Public Policy

Picard then asserted allowing the Second Circuit’s decision to stand would mean financial institutions would not be held accountable for their actions and would even be incentivized to engage in questionable activities.²⁵¹ This was a weak and speculative argument. Financial firms take their reputation in the marketplace seriously; not being pursued by trustees in these types of cases will not

²⁴⁴ *Id.*; see Brief in Opposition for HSBC & Unicredit Respondents, *supra* note 125, at 18 (supporting the conclusion).

²⁴⁵ “The wording cited by Picard was proposed by SIPC itself as a “Minor Substantive or Technical Amendment[] in order to make clear that SIPC’s subrogation rights under the 1970 Act are cumulative with whatever rights it may have under other State or Federal laws.” *Hearings on H.R. 8064*, 94th Cong. 197, 199 (1976) (Memorandum of the Securities Investor Protection Corporation in Regard to Certain Comments Concerning H.R. 8064) (internal quotation marks omitted); see also *In re Bernard L. Madoff Inv. Sec. LLC.*, 721 F.3d 54, 75 (2d Cir. 2013).

²⁴⁶ Petition for Writ of Certiorari, *supra* note 146, at 24.

²⁴⁷ *Id.* at 19 (“[The Second Circuit’s decision inhibits] SIPA’s objectives of protecting securities investors and maintaining confidence in U.S. securities markets.”).

²⁴⁸ Brief in Opposition for HSBC & Unicredit Respondents, *supra* note 125, at 22 (“SIPA’s legislative history does not suggest that subrogation would be a significant factor in maintaining the SIPC Fund.”). “It is, of course, hoped and contemplated that, when the liquidation proceedings are completed, SIPC will receive back some moneys from the trustee.” H.R. Rep. No. 91-1613 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5254, 5262.

²⁴⁹ “SIPC is funded by assessments made upon the members of the broker-dealer industry.” Daniel Klein, Annotation, *Construction and Application of Term “Customer” in Securities Investor Protection Act (SIPA)*, 52 A.L.R. FED. 2d 491 (2011).

²⁵⁰ First, it should be noted “holding financial institutions accountable for their conduct” was not a stated objective of SIPA. Petition for Writ of Certiorari, *supra* note 146, at 19. Second, it should be noted the SIPC’s job is to front money to customers, and, if it cannot recoup all of that money, it has the ability to increase rates on the industry. *Id.* at 21.

²⁵¹ *Id.* at 6–7.

suddenly incentivize malfeasance.

Picard also declared because broker-dealer failures are common within the Second Circuit, the issues in his writ need resolution by the Court.²⁵² This might have been true from 2008 to 2012, but not today.²⁵³ This situation has arisen primarily because Picard decided to push the boundaries of the law. The law places limits on recovery; this is a risk all investors must bear.²⁵⁴ This area of subrogation law has not been seriously questioned since 1978, so to say it suddenly needs examination overstates the truth.²⁵⁵

3. Defendants' Additional Subrogation Points

The defendants also raised a few additional points worth mentioning. First, under SIPA, the SIPC does not get reimbursed until the claims of customers are satisfied.²⁵⁶ In *Picard*, all customer claims have yet to be satisfied, so subrogation

²⁵² *Id.*

²⁵³ 2012 SEC. INVESTOR PROTECTION CORP. ANN. REP. 6, available at <http://www.sipc.org/Content/media/annual-reports/2012-annual-report.PDF>.

²⁵⁴ The SIPC website is clear on this point:

SIPC protection is limited. SIPC only protects the custody function of the broker dealer, which means that SIPC works to restore to customers their securities and cash that are in their accounts when the brokerage firm liquidation begins.

SIPC does not protect against the decline in value of your securities. SIPC does not protect individuals who are sold worthless stocks and other securities. SIPC does not protect claims against a broker for bad investment advice, or for recommending inappropriate investments.

It is important to recognize that SIPC protection is not the same as protection for your cash at a Federal Deposit Insurance Corporation (FDIC) insured banking institution because SIPC does not protect the value of any security.

Investments in the stock market are subject to fluctuations in market value. SIPC was not created to protect these risks. That is why SIPC does not bail out investors when the value of their stocks, bonds and other investment falls for any reason. Instead, in a liquidation, SIPC replaces the missing stocks and other securities when it is possible to do so.

What SIPC Protects, SEC. INVESTOR PROTECTION CORP. <http://www.sipc.org/for-investors/what-sipc-protects> (last visited Mar. 30, 2014).

²⁵⁵ The fact *Picard* can only point to a few cases, that in the end are not really distinguishable, is a sign this area of law is not seriously questioned on legal grounds. Whether there are strong public policy reasons for changing the law is an entirely different matter.

²⁵⁶ The trustee shall allocate customer property of the debtor as follows:

(A) first, to SIPC in repayment of advances made by SIPC

.....

(B) second, to customers of such debtor, who shall share ratably in such customer property on the basis and to the extent of their respective net equities

.....

(C) third, to SIPC as subrogee for the claims of customers.

is premature.²⁵⁷ Second, they pointed out Picard improperly pleaded the case because each individual customer is entitled to different amounts.²⁵⁸ Third, to allow this case to proceed would present difficult issues, for example, how would proving the reliance of thousands of people be handled?²⁵⁹ The Supreme Court in *Caplin* expressed similar concerns:

[I]t is extremely doubtful that the trustee and all debenture holders would agree on the amount of damages to seek [in a consolidated case], or even on the theory on which to sue. Moreover, if the indenture trustee wins the suit brought by the trustee in reorganization, unless the debenture holders are bound by that victory, the proliferation of litigation [will result] . . . [not to mention the question of] who [would be] bound by any settlement.”

Fifth, they pointed out the well-worn idea, despite the appeal of some of Picard’s arguments, Congress is the appropriate party to determine public policy.²⁶⁰ Sixth and finally, they noted adopting Picard’s view would raise more issues than it would solve and would throw the law into a state of confusion.²⁶¹

B. Bankruptcy Code Section 544

Picard then turned to the Bankruptcy Code. Section 544 of the Bankruptcy Code states, in pertinent part:

A trustee shall have, as of the commencement of the case . . . the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by . . . a creditor that extends credit to the debtor at the time of the commencement of

²⁵⁷ “SIPC’s assertion of subrogation rights on behalf of all customers is premature. SIPA requires BLMIS customers’ claims against the estate to be satisfied in full before SIPC may sue as subrogee[—]and this has not yet happened here.” Brief in Opposition for HSBC & Unicredit Respondents, *supra* note 125, at 23.

²⁵⁸ *Id.* (“[Picard] has treated all supposed subrogers[—]that is, all of the thousands of BLMIS customers[—]as an undifferentiated mass.”).

²⁵⁹ *Id.*:

Proof of plaintiffs’ individualized reliance is an element of all these claims. The practical case management concerns that this Court expressed in *Caplin* are magnified where the respective liabilities of all these defendants to each of the thousands of BLMIS’s customers are sought to be determined through mass subrogation actions by a single purported subrogee.

Id. (citations omitted).

²⁶⁰ *Bob Jones Univ. v. United States*, 461 U.S. 574, 612 (1983) (“The contours of public policy should be determined by Congress, not by judges . . .”).

²⁶¹ Brief in Opposition for HSBC & Unicredit Respondents, *supra* note 125, at 20 (“[E]ngrafting unspecified common law rights of subrogation onto SIPA would throw the law into a state of confusion.”); see *In re Bernard L. Madoff Inv. Sec. LLC.*, 721 F.3d 54, 77 (2d Cir. 2013).

the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien.²⁶²

Picard argued this language, especially the “rights and powers” language, confers standing on a SIPA trustee to bring suit on behalf of creditors.²⁶³ He also asserted there is a circuit split on the issue.²⁶⁴ The defendants made a strong case for why Picard expressly disavowed this issue on appeal;²⁶⁵ however, this case note will examine the merits of the argument.²⁶⁶

1. *The Meaning of Section 544*

Picard argued the language of 544 is straightforward and confers standing upon him to sue on behalf of creditors.²⁶⁷ Defendants pointed out multiple flaws. First, 544, known as the “strong arm” provision, is meant to give the trustee first

²⁶² 11 U.S.C. § 544 (2012).

²⁶³ Picard does have case law to support the general proposition § 544 confers standing on a trustee to pursue some claims that are held by creditors. However, the devil here is in the details. Circuits around the country have held trustees can assert claims on behalf of creditors under a variety of circumstances. Whether the situations where this is allowed are consistent across the country is debatable. This may be one area where the Supreme Court might want to hear this case, to establish a standard as to when § 544 confers standing on a trustee, if at all. There is a definite split of opinion as to a broad and narrow reading of § 544. See PHELPS & RHODES, *supra* note 3, at 13.02[2][b].

²⁶⁴ Petition for Writ of Certiorari, *supra* note 146, at 32–33.

²⁶⁵ *Id.*:

Petitioner’s Section 544(a) argument was something of an afterthought, and one he quickly cast aside. He raised it only in the JPMorgan and UBS cases in the district court, and after that court found it preposterous, he expressly disavowed it in the court of appeals. He explained that on appeal he [would not] . . . pursue the issue of whether he could . . . pursue common law claims as a ‘hypothetical judgment creditor’ under section 544(a) of the Bankruptcy Code. Relying on this express waiver, the court of appeals declined to address the question under Section 544(a) that petitioner now urges upon this Court.

Brief for the JPMorgan Respondents and the UBS Respondents in Opposition, *In re Bernard L. Madoff Inv. Secs. LLC.*, (No. 13-448) (Dec. 2013), 21 (citations omitted) (internal quotation marks omitted).

²⁶⁶ The Second Circuit did note:

In proceedings before one of the district courts, the Trustee grounded his standing argument in large part on Section 544(a) of the Bankruptcy Code, which gives a trustee the rights of a hypothetical lien creditor. The court considered this argument at length and ultimately rejected it, and the Trustee has abandoned it on appeal.

In re Bernard L. Madoff, 721 F.3d at 66. In Picard’s reply brief, he asserted “[t]he Trustee raised two arguments under Section 544(a): one regarding such ‘general’ claims, and the other regarding common law causes of action that belong to BLMIS. The Trustee specifically declined to raise the latter argument on appeal.” Reply Brief of Petitioner, *supra* note 210, at 10.

²⁶⁷ Petition for Writ of Certiorari, *supra* note 146, at 32–36.

priority in a bankruptcy proceeding.²⁶⁸ It is not meant to transfer the rights of creditors to the trustee; it is meant to provide a legal mechanism for the trustee to recover property for the estate.²⁶⁹ The defendants cited Collier on Bankruptcy: “Section 544 is limited to avoidance actions and does not give the trustee standing to pursue tort claims that were not the property of the estate at the commencement of the case.”²⁷⁰

Second, the language of 544 talks about “right and powers” that come “at the time of the commencement of the case.”²⁷¹ However, in the *Picard* case, the hypothetical claims against third parties arose *before* the commencement of the bankruptcy case.²⁷² This is exactly what the district court noted: “[A] hypothetical judgment creditor who extends credit at the commencement of the liquidation would not possess any cause of action or any other right that accrued before he extended credit.”²⁷³

Third, the defendants pointed out, when the new Bankruptcy Code was passed, Congress made no mention of overruling *Caplin*,²⁷⁴ and many courts have subsequently held the current version of 544 does not supersede *Caplin*.²⁷⁵ Also, as mentioned, the Supreme Court in *Caplin* practically invited Congress to act and

²⁶⁸ *Id.*:

Section 544(a) is the ‘strong arm clause’ of the Bankruptcy Code, formerly found in section 70c of the Bankruptcy Act. Under 544(a) the trustee may avoid a transfer because of some defect in the creation of a perfected security interest, including a filing defect. Section 544 gives the trustee (and thus the debtor here under Section 1107) the status of a hypothetical lien creditor

In re Johnson, 28 B.R. 292, 295 (Bankr. N.D. Ill. 1983). In other words, it is meant to defeat secret liens or unperfected security interests and give a trustee first priority to recover assets.

²⁶⁹ *Id.* at 298 (“Section 544 of the Bankruptcy Code was designed to aid the debtor or trustee of a bankruptcy estate in recovering property of the estate.”); *Bank of California v. LMJ, Inc. (In re LMJ, Inc.)*, 159 B.R. 926, 928 (D. Nev. 1993) (“The section was designed to aid the trustee in recovering properties of the estate. . .”).

²⁷⁰ *Collier on Bankruptcy*, *supra* note 15, at 5–544; *Stanziale v. McGladrey & Pullen, LLP. (In re Student Fin. Corp.)*, 334 B.R. 776, 778 (D. Del. 2005) (“There is ample authority for the contention that § 544 is limited to avoidance actions.”).

²⁷¹ 11 U.S.C. § 544 (2012).

²⁷² *In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 231 (2d Cir. 2011) (“In the aftermath of a colossal Ponzi scheme conducted by Bernard Madoff over a period of years, Irving H. Picard has been appointed, pursuant to the Securities Investor Protection Act as Trustee for the liquidation of Bernard L. Madoff Investment Securities LLC.”) (citations omitted).

²⁷³ *Picard v. JPMorgan Chase & Co.*, 460 B.R. 84, 93–94 (S.D.N.Y. 2011).

²⁷⁴ *In re Bradley*, 326 F. App’x 838, 839 (5th Cir. 2009) (“Congress considered including a provision that would have expressly overruled *Caplin* but declined to do so.”); *In re Ozark Rest. Equip. Co., Inc.*, 816 F.2d 1222, 1227–28 (8th Cir. 1987) (“As originally proposed by the House, Section 544 was to contain a subsection (c), which was intended to overrule *Caplin*. It is extremely noteworthy, however, that this provision was deleted before promulgation of the final version of Section 544.”).

²⁷⁵ *In re Bradley*, 326 F. App’x at 839 (“We agree with our sister circuit that Congress’s adoption of the “strong-arm clause,” 11 U.S.C. § 544(a), did not supersede *Caplin*’s holding that a trustee lacks authority to assert a claim against a third party that does not comprise part of the bankruptcy estate.”).

provide standing to a trustee:

Congress could determine that the trustee in a reorganization [is] so well situated for bringing suits against [a third-party] indenture trustees that he should be permitted to do so. In this event, Congress might also determine [a] trustee's action [is] exclusive, or that it should be brought as a class action on behalf of all debenture holders, or perhaps even that the debenture holders should have the option of suing on their own or having the trustee sue on their behalf. Any number of alternatives are available.²⁷⁶

The fact Congress did not take this invitation is telling. In sum, the weight of authority indicates the trustee does not have standing to bring claims belonging solely to creditors under 544.²⁷⁷ As the district court said: the “problems with petitioner’s [544] theory are indeed legion.”²⁷⁸

2. Circuit Split

Picard cited *Koch Refining v. Farmers Union Central Exchange, Inc.*²⁷⁹ and *In re American Cartage, Inc.*²⁸⁰ for the proposition a trustee can bring claims on behalf of creditors under 544, as long as the claims are common to all creditors.²⁸¹ This issue has been cited by some as a true circuit split.²⁸² However, in *Koch* and *Cartage*, the trustees asserted claims common to the creditors *and* the debtor, not just creditors personally. The issue boils down to the line between a claim that is general and a claim that is personal.

In *Koch*, the trustee sued the debtor’s shareholders, on behalf of both the debtor and creditors.²⁸³ The court held the trustee could bring claims “general and common to the corporation and creditors.”²⁸⁴ Furthermore, the court noted, as the injuries to the debtor were the primary focus of the litigation and the claims of creditors were secondary, the case could proceed with the trustee at the helm.²⁸⁵

²⁷⁶ *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416, 434 (1972).

²⁷⁷ *In re Rare Coin Galleries of Am., Inc.*, 862 F.2d 896, 900 (1st Cir. 1988) (“The trustee, however, has no power to assert any claim on behalf of the creditors when the cause of action belongs solely to them.”).

²⁷⁸ Brief for the JPMorgan Respondents & the UBS Respondents in Opposition, *supra* note 265, at 24.

²⁷⁹ 831 F.2d 1339, 1341 (7th Cir. 1987)

²⁸⁰ 656 F.3d 82, 87 (1st Cir. 2011).

²⁸¹ Petition for Writ of Certiorari, *supra* note 146, at 32–33.

²⁸² PHELPS & RHODES, *supra* note 3.

²⁸³ *Koch*, 831 F.2d at 1350.

²⁸⁴ *Id.* at 1349.

²⁸⁵ *Id.* at 1354 (“The complaint of the oil companies alleges no injury to them by the named defendants. They have sought a declaration that the Member-Owners harmed ECI, and that the Member-Owners’ manipulation of ECI had a detrimental effect on them; this secondary or resultant effect is not a sufficient showing that they themselves were injured by the Member-Owners.”).

Picard cited a line of this opinion in which the court said the trustee can bring claims as a representative of creditors.²⁸⁶ However, Picard failed to note a qualification preceding the quote: “[T]he trustee has no standing to bring *personal* claims of creditors. A cause of action is ‘personal’ if the claimant himself is harmed and no other claimant or creditor has an interest in the cause.”²⁸⁷ Assuming the claims at issue in *Picard* cannot be characterized as general to all customers, then defendants have the better argument.

Cartage involved a suit brought by the trustee of a debtor against a former manager of the debtor.²⁸⁸ The *Cartage* court noted, though “the trustee lacks standing to pursue claims that belong personally to the creditors . . . [i]f the claim is a general one, it is property of the estate.”²⁸⁹ The court summarized the distinction: “[W]hen the alleged injury to a creditor is indirect or derives solely from an injury to the debtor, the claim is general.”²⁹⁰ In the present case, the claims were by no means general to all creditors. As the district court noted, claims were brought “on behalf of thousands of customers against third-party financial institutions for their handling of varying amounts[,]” and this conduct “could not have harmed all customers in the same way.”²⁹¹ In sum, defendants appear to have the better argument here, yet the Court may want to resolve this issue.

C. Equity and Public Policy

Picard’s final arguments of equity and public policy were repeated from his Second Circuit argument.²⁹² However, defendants’ responses are worth mentioning. First, they point out a trustee’s powers to recover money for the estate are not limited, because a trustee has fraudulent transfer suits as one of many means for recovering property for the estate.²⁹³ Because a statute of limitations has run or an affirmative defense is available is a function of Congress’s decision to

²⁸⁶ Petition for Writ of Certiorari, *supra* note 146.

²⁸⁷ *Id.* at 1348.

²⁸⁸ *In re Am. Cartage, Inc.*, 656 F.3d 82, 86 (1st Cir. 2011) (“City filed a state court action against Allied and Zoll. Posturing itself as the debtor’s successor in interest, it alleged that Zoll, while working for the debtor and acting in concert with Allied, had converted assets, interfered with contractual relationships, breached fiduciary duties, and conspired to commit these acts.”).

²⁸⁹ *Id.* at 90 (citations omitted).

²⁹⁰ *Id.*

²⁹¹ Brief for the JPMorgan Respondents & the UBS Respondents in Opposition, *supra* note 265, at 25.

²⁹² There are many who side with the Trustee: “It is the defrauded victims and creditors who stand to lose if the Supreme Court says no.” Kathy B. Phelps, *Jumping Through Hoops to Get Trustee Standing in Ponzi Scheme Cases*, THE PONZI BLOG SCHEME (Jan. 28, 2014), <http://www.theponzibook.blogspot.com/search?updated-max=2014-01-31T15:05:00-08:00&max-results=2&start=2&by-date=false>.

²⁹³ Brief in Opposition for HSBC & Unicredit Respondents, *supra* note 125, at 22 (“[P]etitioner continues to pursue fraudulent transfer and preference claims (under both federal and state law) against each of the respondents herein.”).

balance the interests of trustees and defendants, and to ensure plaintiffs do not sit on their rights.²⁹⁴ It is not an inherent flaw in a court's interpretation of the law. Furthermore, the limitations period serves the important function of creating predictability in the marketplace so good-faith companies and individuals can know, a certain number of years after a transaction, they are free of fraudulent transfer litigation. To adopt Picard's reading of the law would render the statute of limitations superfluous in many cases.

Second, the defendants pointed out there are serious public policy reasons for rejecting Picard's arguments.²⁹⁵ If a trustee were allowed to manage this litigation, customers' choice and freedom to run their own cases would be gone. Indeed, the defendants cite a number of cases in which customers are currently bringing their own claims, which might not be possible if Picard prevails.²⁹⁶ Third, no matter how strong Picard's public policy arguments, "Congress has not yet indicated even a scintilla of an intention to [confer standing upon a trustee to sue third parties on behalf of customers], and that such a policy decision must be left to Congress and not to the judiciary."²⁹⁷

Fourth, it is true the SIPC was created to protect investors, but the framework created was not boundless. The SIPA provisions were made to provide priority status to customers and to help them get their money back *faster* than in traditional bankruptcy. The goal was not to get customers their money back at all costs, including undermining predictability in the securities industry. Defendants' case is well reasoned and supported by the weight of authority.²⁹⁸

VI. IMPACT AND CONCLUSION

Picard's arguments are long on customer-centric public policy but short on the law.²⁹⁹ Despite the emotional appeal of his case to go after large banks, who themselves lost money in the Madoff scandal, the law does not allow it. Congress

²⁹⁴ *Statutes of Limitations*, PROD. LIAB. REP. (CCH) P 3130 (C.C.H.), 2009 WL 4036099 (2012) ("The rationale behind statutes of limitations is to protect both the courts and defendants from the difficulty of adjudicating and defending stale claims. Evidence disappears, potential witnesses leave the jurisdiction, and memory fades. Timeliness of a claim helps to ensure that substantial justice is rendered and that verdicts are based on all relevant evidence. Moreover, statutes of limitations promote efficient use of resources by allowing defendants to direct their time and energies to immediate concerns rather than to remote actions. Further, a statute of limitations implicitly indicates a court's disapproval of one who 'sleeps on his rights.'").

²⁹⁵ Brief for the JPMorgan Respondents & the UBS Respondents in Opposition, *supra* note 265, at 26.

²⁹⁶ *Id.*

²⁹⁷ *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416, 434 (1972).

²⁹⁸ *Birney & Searles*, *supra* note 59, at 83 ("It is difficult to criticize the merits of Judge Rakoff's reasoning. As a matter of statutory interpretation and construction, SIPA does tend to yield the conclusion that a trustee's powers are "cabined by title 11.").

²⁹⁹ This is evidenced by the fact he has lost his case against financial institutions for aiding and abetting fraud at every stage thus far.

passed SIPA to protect and bolster confidence in the securities industry,³⁰⁰ so why would it have also used SIPA to create a new cause of action against the industry and not even mention it in the legislative history?³⁰¹ Furthermore, even if the language were viewed as ambiguous, which it is not, it is *not* the role of the courts or a zealous trustee to legislate and create public policy.³⁰² Also, why would Congress have created overlapping systems for trustees and customers to bring the exact same claims, based on the same facts, against a financial institution? Finally, Picard grasps at a small number of cases that have created small exceptions for trustee standing, but none are applicable to his case, and none create a real circuit split worthy of Supreme Court review.

In addition, Picard's arguments ignore the impact his views would have on the securities industry. Costs of litigation would skyrocket for financial firms, and this cost would certainly be passed on to customers. Furthermore, for fear of constantly being sued for "aiding and abetting" fraud they had no knowledge of, financial institutions would be limited in their ability to plan for the future. Finally, financial institutions might even tighten their credit lending practices, for fear of being exposed to additional layers of risk.

Even if denying Picard's claims somehow "thwarts the 'customer protection' goals of SIPA and . . . negatively impacts customers of Madoff Securities who may not have the means or ability to advance common law claims on their own behalf,"³⁰³ the law does not provide for Picard's positions. Additionally, customers are free to bring their claims, individually or as a class. To adopt Picard's views would not only fundamentally alter securities and bankruptcy law, it would create a *new* type of ill-defined class action against financial institutions. The Supreme Court should affirm the Second Circuit or simply not hear this case. If Congress feels this is an issue, it should legislate. However, despite the outcry of many, Congress has chosen to leave the law as it is, probably because the law works.

³⁰⁰ When President Nixon signed SIPA into law in 1970, he remarked the "functioning of the securities industry is a key element in providing the means for continued growth of American business and the economy of this country." Gerhard Peters & John T. Woolley, *Richard Nixon: Statement on Signing the Securities Investor Protection Act of 1970*, THE AMERICAN PRESIDENCY PROJECT (Dec. 30, 1970), <http://www.presidency.ucsb.edu/ws/?pid=2870>.

³⁰¹ Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1087–88 (2003) ("[J]udges cannot legitimately make new law according to their 'private sentiments' for two reasons: (1) they simply lack the legislative power to do so; and (2) permitting judges to legislate introduces instability and uncertainty into the law.").

³⁰² Birney & Searles, *supra* note 59, at 31 ("[C]onferring standing upon a SIPA trustee to pursue certain causes of action against third parties would clearly advance SIPA's primary goal of affording greater protections for the customers of failed firms by maximizing their potential recoveries.").

³⁰³ Frankel, *supra* note 220 ("[T]he Supreme Court wants to understand all of the policy implications of the trustee's arguments.").