

eKilgore

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newsflash

RECOVERY OF INVESTMENT ASSETS, HEDGEFUND REDEMPTIONS

"You don't know who's swimming naked until the tide goes out."

So now that Madoff is exposed, what can investors expect? For those who invested in the Madoff funds through a go-between investment vehicle, the issue may be a matter of *gross negligence* and *recklessness*. The argument is that it is hard to explain a go-between fund charging a *management fee* for conducting *due diligence* on an investment in a Madoff hedge fund and not catching the red flags about the investment. Lawyers will be looking to capture policies insuring the go-between funds against negligence. In any event, recovery from third-parties will be difficult. *Legal Metric* reports that less than 30 percent of cases against third-parties, such as accountants, brokers and fund managers, result in a judgment for plaintiff. When accountants and brokers fight rather than settle, the plaintiff's chance falls to less than 5 percent. Even then on average it takes two-and-a-half years to settle.

For those who received redemptions from the Madoff funds, the concern is that bankruptcy courts can *claw back* redemptions made to innocent investors. Hedge fund redemptions made with intent to hinder, delay or defraud creditors may be avoided. The issue is not the intent of the creditors who receive the transfers but the debtor/hedge fund that made the redemptions in order to continue the Ponzi scheme. In 2005, the Bayou Hedge Funds spectacularly collapsed. The bankruptcy court then required certain creditors who had received redemptions to return those redemptions.

Of course, all this occurs in a market where at least 24 hedge funds have frozen redemptions, tying up tens of billions of dollars for an indefinite period.



Ted Anderson
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Kilgore + Kilgore provides leverage to institutional and high-net worth investors in recovering their investments. During the savings and loan collapse of the 1980s, Kilgore set ground-breaking precedent in helping investors recover their assets lost due to fraud and gross negligence. This practice continues today. In the new millennium, Kilgore helped a business recover assets lost when a lender pulled out of the deal. Kilgore currently represents an investment fund in securities fraud litigation initiated to recover an investment lost due to fraud. Kilgore clients include a member of Forbes 100 Richest, public institutions like Bank of New York Mellon, private institutions like Professional Bank, investment bankers from the defunct Lehman Brothers and numerous other executives and investors.

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- 1 Attributed to Warren Buffet.
- 2 "They would have known that Madoff's outside auditor was not a nationally recognized firm specializing in institutions but the three-person shop, New City, New York-based Friehtling & Horowitz. He also did not have a third-party administrator signing off on his books, but did the clearing, settling and accounting in-house." Associated Press, *Hedge Funds Failed to Spot Madoff Risks*. (International Herald Tribune December 17, 2008).
- 3 New York Law School v. Ascot Partners LP, *J.Ezra Merkin, BDO Seidman LLP* (December 2008 Southern District of NY)
- 4 "Recovery from Third Parties in Madoff Scandal Will Be Difficult" (LegalMetric January 5, 2009).
- 5 11 USC section 548(a)(1)(A).
- 6 Gretchen Morgenson, *A Hedge Fund Falls Off the Face of the Earth*, (New York Times Business Section August 28, 2005).
- 7 In re Bayou Group LLC. 2008 Bank. LEXIS 3261 (October 16, 2008).
- 8 BusinessWeek.com, (Business Week March 5, 2008).
- 9 In re LTV Securities Lit., 89 F.R.D 595 (ND Tex 1981), *Finkel v. Docutel Olivetti* 817 F.2d 356 (5th Cir. 1987); *Sonem Partners v. Parker Parsley*, 38 F.3d 211 (5th Cir. 1994); *BancOne Venture v. Kneipper*, 817 F.2d 356 (5th Cir. 1987).
- 10 *Grant Thornton v. Suntrust Bank*, 133 S.W.3d 342 (Tex. Civ. App. Dallas 2004); pet. Rev. denied 2008 Tex.LEXIS 38.
- 11 In the words of ST Global President, L.A. Train, "Let this serve as our endorsement of you to any person or business that needs a champion in protecting itself from unfair and unjust business activity."