

Exhibit 26

ARGUMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION
CORPORATION, IRVING H. PICARD,

Plaintiffs,

New York, N.Y.

V.

12 Misc. 115 (JSR)

BERNARD L. MADOFF INVESTMENT
SECURITIES, LLC,

Defendant.

September 21, 2012
4:36 p.m.

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

SECURITIES INVESTOR PROTECTION CORPORATION

Attorneys for Plaintiff SIPC

BY: CHRISTOPHER H. LaROSA

BAKER & HOSTETLER LLP

Attorneys for Plaintiff

Trustee Irving H. Picard

BY: REGINA L. GRIFFIN

THOMAS L. LONG

YOUNG CONAWAY STARGATT & TAYLOR, LLP

Conflicts Counsel for the Trustee

BY: ANDREW L. MAGAZINER

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APPEARANCES CONTINUED

IVAN & WORCESTER LLP
Attorneys for Bank Austria
BY: FRANKLIN B. VELIE
JONATHAN G. KORTMANSKY
MITCHELL C. STEIN

SULLIVAN & CROMWELL LLP
Attorneys for Standard Chartered Bank
Bank J. Safra (Gibraltar) Ltd.
Banque J. Safra (Suisse) SA
BY: ROBINSON B. LACY

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Attorneys for UniCredit and Pioneer
BY: JEREMY A. BERMAN

KELLEY DRYE & WARREN LLP
Attorneys for CACEIS Bank and
CACEIS Bank Luxembourg SA
BY: DANIEL SCHIMMEL

BECKER, GLYNN, MELAMED & MUFFLY LLP
Attorneys for Sumitomo Trust & Banking
BY: MICHELLE R. MUFICH

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1 THE CLERK: This is September 21, 2012. This is SIPC,
2 Irving Picard v. Bernard L. Madoff Investment Securities,
3 Docket Number 12 Miscellaneous 115.

4 Will everyone please be seated, and will the parties
5 please identify themselves for the record.

6 MS. GRIFFIN: Good afternoon, your Honor. Regina
7 Griffin, Baker Hostetler, counsel for the SIPC Trustee, Irving
8 Picard.

9 THE COURT: Good afternoon.

10 MR. LaROSA: Chris LaRosa from SIPC.

11 THE COURT: Good afternoon.

12 MR. LONG: Your Honor, Thomas Long, also on behalf of
13 the Trustee.

14 THE COURT: Good afternoon.

15 MR. VELIE: Good afternoon, your Honor. Frank Velie,
16 of Sullivan & Worcester. I represent Bank Austria, and I will
17 be speaking here today on behalf of the extraterritoriality
18 defendants.

19 THE COURT: Good afternoon.

20 MR. KORTMANSKY: Good afternoon, your Honor. Jonathan
21 Kortmansky, also from Sullivan & Worcester, also representing
22 Bank Austria. I will be assisting Mr. Velie and Mr. Velie will
23 be speaking.

24 THE COURT: All right.

25 MR. LACY: Your Honor, I'm Rob Lacy, from Sullivan &

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1 Cromwell. I represent about six different defendants, and I am
2 here because I may have something to add about the Bankruptcy
3 Code when Mr. Velie gets done.

4 THE COURT: I'm sorry?

5 MR. LACY: I may have something to add about the
6 Bankruptcy Code when Mr. Velie is done.

7 THE COURT: OK.

8 MR. BERMAN: Jeremy Berman, from Skadden, Arps,
9 Meagher & Flom, on behalf of UniCredit and Pioneer.

10 THE COURT: Good afternoon.

11 All right. So let me hear from whoever wants to speak
12 on behalf of moving counsel.

13 MR. VELIE: May it please the Court? I'm Frank Velie.
14 As I said, I represent Bank Austria and I'm speaking here for
15 numerous extraterritorial defendants.

16 The motion which is before the Court is to dismiss
17 certain claims brought by the Trustee to recover under Section
18 550 of the Bankruptcy Code subsequent to transfers. The
19 subsequent transfers issued here, your Honor, are wholly
20 foreign. They are from foreign persons. They are to the
21 defendants, all of whom are foreign persons. They all took
22 place abroad, pursuant to foreign law.

23 Unless you particularly ask me to, Judge, I am going
24 to try to avoid matters that are laid out in the briefs, as I
25 understand it is your practice to have read them and you don't

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1 want me to repeat.

2 The remarkable thing about this motion, your Honor, is
3 that the Trustee's claims are absolutely unprecedented. There
4 is no precedent whatever offered by the Trustee or by SIPC
5 where a Court reached out and recovered for a trustee foreign
6 transfers of this type. There are only two instances -- in all
7 the briefing, there are only two cases that deal with a similar
8 issue; that is the Maxwell case and the Midland Euro case. The
9 Maxwell, as I'm sure the Court is aware, three courts here --
10 the Bankruptcy Court, the United States District Court for the
11 Southern District and the United States Court of Appeals for
12 the Second Circuit -- all held that a person in the shoes of a
13 trustee, and there he was an examiner, was not permitted to
14 extend the recovery or, actually, the avoidance of the section
15 in that case to extraterritorial transfer. And in the Midland
16 Euro case -- that's the Bankruptcy Court for the Central
17 District of California -- the same result.

18 What's remarkable about those two cases is in both
19 cases the transferor was the debtor. It was a foreign debtor,
20 and in both cases the transferee was an initial transferee.
21 This is a distinction from our case, but an important one which
22 cuts in our favor. Because, as I'm sure the Court will
23 recognize, an initial transferee takes something out of the
24 pocket of the estate that harms the estate, whereas it's no
25 skin off the nose of the trustee if the initial transferee

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1 gives something to somebody else. That does not take anything
2 out of the pocket of the debtor. In any event, there is no
3 precedent and so this Court is being invited to do what I would
4 claim is a very radical thing, which is to undo these wholly
5 foreign transfers.

6 Not only is the case unprecedented but it appears to
7 fly -- the claims are unprecedented, but they appear to fly
8 directly into the Morrison decision of the Supreme Court. I
9 don't have to rehearse that here, but the obvious thing about
10 Morrison is it is a bright-line test. If the statute doesn't
11 say it has extraterritorial reach, it has none.

12 Here, as we showed in the briefs, and I will not go
13 into this in detail, neither of the statutes at issue here --
14 neither Section 550 of the Code nor 78fff-2(c)(3) of SIPA --
15 say that they have extraterritorial reach, and that should be
16 the ball game.

17 Surprisingly, the Trustee and SIPC argue: No problem.
18 We're not in the way of Morrison. This is a domestic
19 application here. We are not reaching out extraterritorially.

20 I actually find that very surprising because, as I
21 started out by saying, these are claims to recover subsequent
22 transfers made by foreign persons to the foreign defendants
23 overseas under foreign law. I would think that their argument
24 falls of its own weight, and I am going to give it little bit
25 of a shove.

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1 Without authority, what we are offered is a syllogism,
2 and the syllogism goes like this. It has three premises.

3 Number one: The Code and SIPC have only one focus.

4 The second premise: That focus is to replenish the
5 estate of domestic debtors.

6 And number three: What we have here is a domestic
7 debtor. It made a transfer. Therefore, we can go all over the
8 world and recover anything that was transferred initially by
9 the debtor.

10 That's the syllogism.

11 Number one. Morrison does not suggest or hold that a
12 doorstopper, like the Code, or even a relatively
13 narrowly-focused statute like SIPA would have only one focus.
14 In fact, in Morrison, the focus was on 10b. And there was a
15 contrary, a contrasting focus on Sections 30a and 30b, which
16 are extraterritorial. The Court naturally finding that since
17 Congress knows how to write extraterritoriality into a statute
18 when it wants to, it didn't put it in 10b and it did put it in
19 30a and 30b.

20 Second, as we've laid out in the briefs -- and I will
21 not, unless you ask me to, go into this in any detail -- the
22 proper transfer here under Absolute Activist and in Morrison is
23 obviously the transfers, the transfers at issue. And we point
24 that all out in the brief.

25 The third point is that the transfers here are not

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1 domestic in any regard; they are wholly foreign. As an
2 example, this is a miniaturized version of the HSBC Complaint
3 in which Bank Austria is sued. Count One talks about
4 preferential transfers (initial transferees), that's against
5 the feeder fund defendants except for Primeo. Count Two is
6 preferential transfers of subsequent transferees. This is what
7 we are focusing on. It is counts such as this in which we are
8 sued and which should be the proper focus of the Court in this
9 matter. So all three of the premises of the syllogism don't
10 hold up under analysis.

11 But the conclusion doesn't, either. And it certainly
12 doesn't follow and it probably stands the presumption against
13 extraterritoriality on its head to say, well, if we have a
14 domestic debtor and it is domestic focus, we can go all over
15 the globe and undue transfers that have any commercial practice
16 between commercial parties in other countries and take their
17 money away. It's the impact of this which seems to us to be
18 wholly unreasonable.

19 This Court is being asked -- again, without any
20 precedent -- this Court is being asked, first, to go out and to
21 say in effect to foreign persons forget your law, forget that
22 you may have litigated with a liquidator in the country where
23 you live and you may have even prevailed against that
24 liquidator on certain claims and have gotten to keep the
25 transfer at issue, a broker-dealer in the United States went

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1 bankrupt. And when a broker dealer goes bankrupt, a special
2 statute springs into effect and after-the-fact this special
3 statute under U.S. law -- you would be saying to these foreign
4 persons -- this legal fiction springs into effect after the
5 fact and it gives the trustee a right to claim your money. And
6 we're going to take your money, and we're going to take your
7 money and we're going to give it to that trustee so he can
8 share it out among customers of his bankrupt. And, oh, by the
9 way, you're not customers of his bankrupt so you are not going
10 to get anything.

11 They're asking you to say, and to be the very first
12 court to have done this, to say to foreign sovereigns, in the
13 person of foreign courts in their court-appointed liquidators,
14 forget your liquidation, forget that you are trying to get
15 assets for the purpose of doing something for the creditors of
16 the feeder funds, these hedge funds in various places where
17 there are liquidations going on in these foreign countries
18 under the supervision of foreign courts, forget all of that.
19 We've got this legal fiction, and we're going to take every
20 penny and we're going to give it to our bankrupt to share among
21 its creditors.

22 This seems to me a radical intrusion into foreign
23 matters, into matters which are the concern of foreign
24 sovereigns, foreign courts, foreign liquidators, and the like,
25 as well as foreign commercial persons.

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1 I am going to leave to your reading of the briefs
2 exegesis of SIPA and the Code, but I think it is plain when you
3 look there you will see that there is no mention of
4 extraterritoriality and, in particular, in SIPA, a mention of a
5 very domestic focus. SIPA Section 78fff-2(c)(3), which is the
6 recovery section, is a very important section which says for
7 purposes of the transfers, for the purpose of such transfer,
8 state law will not apply; state law is superseded. Obviously,
9 the people who wrote that had a domestic concern. They did not
10 say all that they could have: Disregard foreign law, this
11 fiction will spring into effect.

12 I want to say a quick word about the concept of
13 comity. Here we're talking about legislative or prescriptive
14 comity. This is basically a canon of legislative
15 interpretation. And it says even if the trustee were to have a
16 plausible reading of these statutes which gives it
17 extraterritorial reach, if the impact, as it is here, is to
18 unreasonably interfere with the activities of foreign
19 commercial persons, or the activities of a foreign sovereign,
20 then the court must find some other reading of the statute to
21 avoid that.

22 Comity, of course, as the Court will recall, was the
23 grounds on which the Second Circuit upheld the decision of the
24 District Court and the Bankruptcy Court in the Maxwell case.

25 And then a final word.

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1 The Trustee says that the result we argue for is
2 absurd. I was tempted, in preparing this argument, to say, oh,
3 no, their argument is absurd. But that's not the right word
4 for it. It's aggressive. It goes far too far. It is radical
5 is what it is. Their argument is a radical one. This Court is
6 being invited to do something that no other court has done, and
7 it is a radical result.

8 I also wanted to say, and we did say this in the
9 briefs but I'll finish with this: It is never absurd to read a
10 statute for what it holds and what it does not hold.

11 Unless you have any questions for me, your Honor --

12 THE COURT: No. But I do want to hear if there is
13 anything else that any moving counsel wants to say before I
14 hear from responding counsel.

15 MR. LACY: No, your Honor.

16 MR. BERMAN: No, your Honor.

17 THE COURT: OK. Let me hear from Trustee's counsel.

18 MS. GRIFFIN: Your Honor, would you have any objection
19 to me arguing from here?

20 THE COURT: No. But just be sure -- a lot of folks
21 are here to hear what you have to say. Some of them are even
22 your friends, so speak loudly enough.

23 MS. GRIFFIN: Your Honor, I will do my best.

24 Your Honor, we heard a lot about how there is no
25 precedent. Your Honor, Morrison came down about two years ago,

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1 and I don't think the Trustee disputes that this is the first
2 time that the Court is really being asked to address the issues
3 that were raised about presumption against extraterritoriality
4 that were raised in Morrison with regard to the Bankruptcy Code
5 SIPA. But, your Honor, it's very clear that the defendants'
6 briefs do not engage in any meaningful analysis or focus of the
7 Code or SIPA as Morrison instructs.

8 And, your Honor, Morrison very clearly directs that
9 you look to the Act as a whole, the Bankruptcy Code or SIPA,
10 you look to the object of solicitude of the statute, you look
11 to what activity Congress is seeking to regulate, and you look
12 to what parties the statute was meant to protect. And, your
13 Honor, it's not about parsing the words of a particular
14 statute; it is looking to what was Congress's -- what was the
15 heart of what Congress was trying to regulate when it enacted
16 the Code? And when the Supreme Court looked in Morrison at
17 10b, it concluded that essentially Congress' focus was on
18 regulating the transactions -- the purchase-and-sale
19 transactions of securities on a domestic exchange.

20 And, your Honor, if you apply that analysis here to
21 the Bankruptcy Code and SIPA, you will absolutely see that it
22 is not a syllogism. The heart of what the Bankruptcy Code is
23 seeking to regulate is the liquidation of a debtor. The object
24 of solicitude of the -- but, actually, the purpose of the
25 Bankruptcy Code, it does have more than one purpose. It has

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1 two purposes, one of which is not relevant, which is to provide
2 a debtor a fresh start; but the other is the maximization of
3 the estate's assets for distribution to creditors.

4 And, your Honor, the avoidance and recovery provisions
5 of the Code effectuate that purpose by essentially righting the
6 wrongs committed by debtors, domestic debtors, who deplete
7 their estate's assets by fraudulently conveying them to other
8 parties. And, your Honor, what parties of the statutes are
9 meant to protect are the defrauded creditors of the debtor
10 here.

11 And, your Honor, the defense's analysis, if you look
12 in their papers, it is all over the map. As a matter of fact,
13 they don't even address the issue in their moving papers. They
14 talk about -- they seem to suggest that the focus is on the
15 transferees, where they live or where they reside. But, your
16 Honor, it's clear that under the Morrison focus analysis, not
17 the statute's language but the focus analysis, that Congress
18 wasn't focused on the recipients of fraudulent transfers. And
19 if you apply Morrison's analysis here, it's very clear that all
20 the Trustee is doing is using the Bankruptcy Code to remedy the
21 fraudulent conveyances of a domestic debtor here and that using
22 the Morrison analysis, that is nothing more than a domestic
23 application of the avoidance and recovery --

24 THE COURT: But doesn't that argument cut more
25 strongly in the case of initial transfers, as opposed to

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1 secondary transfers?

2 MS. GRIFFIN: Well, your Honor, essentially, that's
3 another point we were about to make. The focus of Congress on
4 the avoidance and recovery provisions is not on subsequent
5 transfers. If you very clearly look at 548, it is talking
6 about the avoidance of the debtor's transfers. And counsel is
7 right, we are talking about the initial transfers. And what
8 550 permits is the recovery of those transfers from any
9 particular recipient.

10 And so, again, focusing on Congress's focus in
11 enacting those provisions, it's on recovering that property
12 that was fraudulently conveyed by this debtor; it was not on
13 the particular type of transferee. It certainly wasn't on any
14 potential subsequent transfer because it could be recovered
15 from the initial transferee.

16 And, your Honor, if you look at the investment advisor
17 cases that we point to in our brief, I think it is SEC v. Gruss
18 and SEC v. ICP Asset Management, in those cases the Court
19 looked to the Investment Advisor Act. And while the companies
20 there pointed to the fact that they thought the focus was on
21 the client and where the client might be located, the reality
22 is the Court said when they looked at the Investment Advisor
23 Act, it was, of course, what was Congress concerned with and
24 focused on? The investment advisor.

25 So it comes down to this, your Honor. Under Morrison,

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1 once you determine what Congress's focus is, whatever other
2 facts that are outside that focus are not really relevant to
3 the analysis here. So the fact of where particular recipients
4 of the fraudulent transfers may reside are not within
5 Congress's focus. The fact of where particular subsequent
6 transfers may have taken place is not within Congress's focus.
7 Those facts may be relevant to other defenses -- personal
8 jurisdiction; it could have to do with whether or not the
9 Trustee's judgment obtained here may be enforceable somewhere
10 else -- but it does not go to the heart of the issue before the
11 Court, and that is whether the presumption against the
12 extraterritorial application of statutes applies here because
13 this involves a purely domestic application of the statute.

14 And, your Honor, a word on Maxwell.

15 Maxwell was, of course, decided before the Morrison
16 decision came out, but that case involved a foreign debtor.
17 And so, your Honor, that would be arguably the quintessential
18 example of what would be the extraterritorial application of
19 the Bankruptcy Code and the avoidance and recovery provisions.
20 Where it was a foreign company, an English company, that had
21 liquidation proceedings going on in London. They had the very
22 unusual circumstances of having dual primary liquidation
23 proceedings going on in both the U.S. and in London. But Judge
24 Brosnan focused on the fact that there, using a
25 center-of-gravity test, the English company had made

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1 preferential transfers overseas to English and French banks and
2 basically in response to debts that were incurred by those
3 banks overseas.

4 And, your Honor, pre-Morrison it was a
5 center-of-gravity test. Post-Morrison that would probably be a
6 situation where that English company cannot use the U.S.
7 Bankruptcy Code and avoidance and recovery provisions to
8 recover those transfers. That is not what we're talking about
9 here.

10 And as a matter of fact, your Honor, counsel for the
11 defendants brings up the liquidation in the BVI, and we're
12 getting into a whole comity analysis, which, by the way,
13 wasn't, you know, for the briefing before your Honor. We
14 merely pointed out in our brief that the defendants' analysis
15 of Morrison was flawed and it appeared to be more like a comity
16 analysis.

17 I'm going to get into a very brief discussion -- I
18 know you've read our papers; I'm not going to belabor the
19 issue. But the very fact that the Fairfield liquidators are
20 pursuing avoidance actions elsewhere in their insolvency
21 proceedings -- and BVI is not surprising -- in a fraud as
22 massive as this one, there are litigations involving multiple
23 laws, multiple parties in various jurisdictions. Investors are
24 suing feeder funds. Investors are suing the managers of those
25 funds. Auditors are being sued all over the world. Insolvency

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1 proceedings everywhere. But, your Honor, one of the things
2 defendants didn't say is that the BVI didn't decide that the
3 bankruptcy causes of action of those feeder funds were
4 dismissed. Those causes of action of that feeder fund are
5 actually pending right now. Those avoidance actions of the
6 Fairfield liquidators, the Madoff feeder funds, are pending
7 before Judge Lifland.

8 And you know what, your Honor, they're being brought
9 in an ancillary proceeding here using the laws of the debtor's
10 home country, the BVI. They're using their own country's laws,
11 their Bankruptcy Code and avoidance and recovery provisions,
12 because that's what the international community has decided to
13 do.

14 Essentially, your Honor -- and I am drifting into
15 comity, and, I'm sorry, I am just going to head in that general
16 direction. But that's what Chapter 15 and the countries that
17 adopted this model insolvency code say. Basically, those
18 countries that have signed onto UNCITRAL have decided that they
19 are going to aid the main proceeding of a bankrupt debtor and
20 they are going to decide that that main proceeding is where the
21 center of main interest of the debtor is -- generally, your
22 Honor, where the debtor's principal place of business is. And
23 so, your Honor, if you look at all the comity factors that are
24 listed in the Restatement 403 that deal with the Restatement on
25 Foreign Relations 403 and you look at them here, and it is very

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1 clear that even under a comity analysis there is no other
2 country that has more of an interest in ensuring that its
3 bankruptcy code and avoidance provisions are applied to its
4 debtor in the United States.

5 Certainly -- as a matter of fact, defendants don't
6 even proffer another country's avoidance action or bankruptcy
7 code that should apply to this debtor. And right there that's
8 the rub, your Honor. The very case they cite to you, that
9 feeder fund is using its own laws because that's the way it is
10 supposed to work. There is no conflict.

11 But if you go through all of these factors -- the link
12 of the activity to the territory of the regulating state, the
13 extent to which the activity takes place within the territory
14 or has substantial direct and foreseeable effect upon or in the
15 territory -- obviously, your Honor -- and the connections such
16 as the nationality, residence, or economic activity between the
17 regulating state and the person principally responsible for the
18 activity to be regulated -- without a doubt, your Honor,
19 certainly the United States has a very significant interest in
20 regulating the conduct of the debtor here, headquartered in the
21 U.S., that orchestrated the most massive Ponzi scheme ever, out
22 of New York, transferred all of its property out of a bank
23 account in New York. So that factor clearly militates in favor
24 here. Again, nothing pointed to by the other parties in that
25 regard.

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1 The character of the activity to be regulated, the
2 importance of regulation to the regulate state. Obviously, the
3 Bankruptcy Code and SIPA are two separate acts that are very
4 concerned with this. Congress was very concerned and had a
5 very serious interest in ensuring that and, including SIPA, the
6 expedited return of customer property that is fraudulently
7 conveyed by a financially-troubled in this case bankrupt
8 broker-dealer.

9 I could go on, your Honor: The importance of the
10 regulation to the international, political, legal, or economic
11 system; the extent to which the regulation is consistent with
12 the traditions of the international system; the extent to which
13 another state may have any interest in regulating the activity.

14 The only law that the defendants point to is really a
15 point that their own home residence might possibly be more
16 interested in protecting the defendants in these particular
17 actions.

18 And essentially, your Honor, with all due respect,
19 comity is not the issue here, and it is certainly not the
20 analysis under Morrison.

21 And, frankly, your Honor, even were this to be a
22 situation where you concluded that this was a situation that
23 requires extraterritorial application of the Code or SIPA, the
24 decision in French that we point to in our brief, which
25 essentially says, look, the Supreme Court has decided that to

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1 determine what property or transfers that a trustee may attempt
2 to recover and avoid, we have to look to essentially Section
3 541 of the Code, which has language, you know, essentially that
4 defines what the property of the estate is, as wherever
5 located; and that has been held to apply territorial without
6 doubt, your Honor.

7 And as the French Fourth Circuit Court pointed out,
8 because Congress intended to essentially determine what
9 property could be transferred by referring to that statute, you
10 have to look at what property was property of the debtor,
11 wherever it was situated, as if before it was filed. An easier
12 way for me to explain this, your Honor, is to give a hard
13 example because I get caught up in the language when speaking.

14 Bernard Madoff had a yacht in France. And before the
15 bankruptcy, just before we see the fraud -- and this is an
16 example, it is not a fact -- he, before the fraud is revealed
17 and before the bankruptcy proceeding is commenced, he
18 fraudulently transfers that yacht in France to his nephew.
19 Subsequently the bankruptcy proceeding is brought here in the
20 United States.

21 Now, all the French court is saying is that but for
22 that transfer that yacht would have been property of the
23 debtor's estate here, and French is saying essentially that
24 because Congress indicated its intent, you have to refer to
25 Section 541 in order to determine what you can avoid, it would

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1 make sense that the Trustee should be permitted to avoid that
2 transfer in order to recall that to the estate that which
3 should have been part of the estate but for that fraudulent
4 transfer.

5 And so, your Honor, I guess what I would like to
6 conclude with is a point that we weren't saying that
7 defendants' arguments were absurd. We're saying that to stop
8 the efficacy of the Bankruptcy Code at the borders would have
9 absurd results. And we gave an instance of just before the
10 bankruptcy what would have happened if Bernard Madoff had
11 transferred billions of dollars of the customers' property to a
12 cousin in Europe and then subsequently transfer it to another
13 cousin in Switzerland. And, your Honor, that simply cannot be
14 the result of that once the property leaves the jurisdictional
15 territory of the United States, that somehow the doctrine of
16 the presumption against extraterritoriality is going to stop
17 that from happening.

18 And the other thing is, your Honor, as we pointed out
19 in our papers, is the Code doesn't splice between who is a
20 foreign resident and who is a domestic residence. And
21 certainly claims of the customers, despite statements in the
22 defendants' papers that somehow the Trustee has denied claims
23 based on a party's foreign status, that is completely not the
24 case. Two of biggest creditors in this case who got
25 distributions this week are foreign creditors.

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1 Your Honor, it has absolutely nothing to do with it.
2 The fact that they were denied their customer claim had only to
3 do with the fact that they didn't fit within the definition of
4 "customer" under SIPA because they were an indirect investor.

5 So, your Honor, it would be absurd to use just the
6 mere happenstance of a party's residence to define the analysis
7 of extraterritoriality when those same parties could come in,
8 and some of these same parties have, as we pointed out, filed
9 claims in this very proceeding. So how does it work that we
10 can't go out but they can come in?

11 So, your Honor, unless you have any further questions?

12 THE COURT: No. Thank you very much.

13 Let me hear from SIPC, if they want to be heard.

14 MR. LaROSA: We don't, actually, your Honor. We will
15 stand on our papers, and I would be happy to answer any
16 questions your Honor wants.

17 THE COURT: Very good. Let's go back to moving
18 counsel.

19 MR. VELIE: Thank you, your Honor.

20 I still haven't heard any precedent, and the important
21 point is not -- the starting point is not Morrison.

22 Extraterritoriality and the presumption against
23 extraterritoriality has been in our law since 1909, when
24 Justice Holmes wrote the American Banana case. In the entire
25 history of the Code, from 1978 forward, and the bankruptcy law

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1 before that, there is no instance when a court has said to a
2 trustee, it's OK, go recover a foreign transfer. Not one.
3 Never. You would be the first..

4 That's the first point.

5 The second point is I thought I heard something about
6 Section 550 saying that if you can avoid you can recover
7 immediate and subsequent transfers and so on. We all know that
8 that doesn't mean that you can't impose or look at defenses.
9 The defense from 546(e), for example, the safe harbor for
10 securities settlement payments, has to be interposed between
11 that moment when there is an avoidance and a recovery. The
12 defenses in 550 may be imposed. So the defense of
13 extraterritoriality also needs to be looked at and imposed.

14 Because in the final analysis what we're being offered
15 is a way to read the statute, and if the Trustee's counsel is
16 correct and you read the statute this way, you will have all
17 that impact on foreign sovereigns and foreign individual
18 commercial transactions that I described earlier. When you
19 have something like that, that was what the presumption against
20 extraterritoriality was supposed to deal with, and that's why
21 Morrison put in a bright-line test. And the bright-line test
22 is very simple -- if it is not in the statute, that's it.

23 Finally, a word about the "absurd" result.

24 I think what the Trustee is trying to say here is that
25 the Trustee will be without a remedy in the event you rule for

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1 us, but that's not the case. Number one, there is a remedy
2 which is provided in the Code in Section 1505, which we pointed
3 out in our papers. He can go to foreign courts and go to the
4 foreign court and ask for whatever relief the foreign court is
5 willing to give him.

6 In fact, not only is that the case from the Code,
7 showing that the drafters of the Code perceived that there
8 might be this problem and solved it by legislating comity, just
9 the way they legislate the permission for foreign liquidators
10 to come here and open ancillary proceedings, they can open, as
11 happened in Maxwell, a full-blown Chapter 11 or Chapter 7 case.
12 Similarly, a Trustee here can go into foreign court and go
13 there and ask for what the foreign law permits, and that would
14 be the appropriate thing to do. It is not only the appropriate
15 thing to do, the Trustee knows about it and is doing it and has
16 brought proceedings in various countries around the world.

17 With your permission, I am going to read from the
18 International Law Practicum, which is a publication of the
19 International Section of the New York State Bar Association,
20 and in it is an article in which Mr. Sheehan, who is Trustee's
21 counsel, is one of the principal authors. And here he is
22 speaking to a symposium, and he says -- he had been talking
23 about foreign actions that he has brought and going into
24 foreign courts and seeking relief in the foreign courts.
25 "Almost every one of the foreign actions has a parallel

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1 proceeding here in the U.S. Bankruptcy Court. The reason for
2 that is fairly obvious. That is, what if we were just to rest
3 on our laurels in the Bankruptcy Court and it turns out we lose
4 the extraterritoriality issue, the personal jurisdiction issue,
5 or whatever that issue may be? Are we therefore, what? Out of
6 luck? We can't go anywhere? So what we're doing is parallel
7 proceedings, and we participated, as I said earlier" -- this is
8 Sheehan speaking -- "throughout the Caribbean Islands and in
9 the U.K."

10 And that is what he was doing. He has a remedy. It
11 is not absurd at all.

12 THE COURT: I don't actually see how the issue of
13 whether he has or has not a remedy is relevant. Maybe I have
14 missed something.

15 If he has a right to bring the lawsuit here, he has a
16 right to bring the lawsuit here. If he doesn't, the fact that
17 it would or would not deprive him of a remedy seems to me
18 neither here nor there.

19 MR. VELIE: I am not arguing with you on that Judge.

20 Who I'm arguing with is Trustee's counsel who says
21 that we are arguing for an absurd result, a result in which the
22 Trustee would be without a remedy, and the answer is that that
23 happens to be incorrect --

24 THE COURT: As I understood the Trustee -- and this is
25 a gross oversimplification, but, I mean, let's take an example

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1 that has nothing do with this case or even the laws here
2 involved; it is just an abstraction.

3 So I steal your cow and I give it to my son. This is
4 clearly a hypothetical since I only have daughters.

5 MR. VELIE: You don't have a cow either.

6 THE COURT: Not the last I checked.

7 And my son takes it to Europe and he sells it to
8 someone there. And now you bring an action for the recovery of
9 the cow or its value and you bring it to get the person who now
10 has the cow. And that may not be an enforceable judgment,
11 which is the point your adversary was making, but she's saying
12 there is something absurd that you shouldn't be able to bring
13 an action for recovery of the cow in the hands of -- we could
14 make it even an easier case for her -- let's say that the
15 person to whom the cow was sold in Europe knows that it is a
16 stolen cow. So that's kind of absurdity I think she is trying
17 to suggest.

18 MR. VELIE: Perhaps. But I think what we need to put
19 into this discussion, Judge, is the distinction in the law
20 between chattels and money. A stolen chattel does not deprive
21 the owner of his title, and he can go anywhere and say I'm
22 owner. That is not the case with money. There is the money
23 rule, which allows the person who receives the transfer of
24 money to put up all manner of defenses.

25 So I just want to try to help you in your thinking

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1 about this. Don't be thinking about stolen chattels, stolen
2 artwork or the like; it is a completely different ballgame.
3 What we have here is a question of statutory interpretation
4 purely, and that is that pursuant to the money rule can this
5 Trustee ask this Court to undo a transfer that took place in
6 the Cayman Islands, say, or in Europe between foreign persons
7 and under foreign law?

8 And the following observations: No judge has ever
9 done it before. The Bankruptcy Code seems to tell the Trustee
10 if you want to go abroad, go to a foreign court and get your
11 remedy there. Morrison tells us look to the statute and see if
12 this is permitted, because it is plainly extraterritorial. And
13 there is nothing in the statute that says that Congress
14 intended this.

15 So in the final analysis, if you read it the way the
16 Trustee reads it, we have this terrific, in the sense of full
17 of terror, impact on foreign sovereigns, courts and persons --
18 never before permitted by a court from 1978 on or even before,
19 as far as we could find. So you are being invited to do
20 something new and, I submit, radical.

21 THE COURT: All right. Thank you very much.

22 All right --

23 MR. LACY: Your Honor, could I say a word?

24 THE COURT: Yes, but it had better be responsive to
25 what the Trustee just said because you had your opportunity to

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1 be heard in the beginning.

2 MR. LACY: Yes, your Honor.

3 I wanted to draw together three things that the
4 Trustee's counsel said.

5 The first, of course, is that the Trustee's counsel
6 treated this entire question in terms of whether United States
7 Bankruptcy Code allows the avoidance of the initial transfer,
8 and that is not the issue. The issue is whether Section
9 550(a)(2) of the Bankruptcy Code allows the recovery of money
10 from a subsequent transferee. So the question you have to
11 answer is does 550(a)(2) fly outside the United States.

12 Now, I want to emphasize the importance of that
13 distinction by referring to another thing the Trustee's counsel
14 said. The Trustee's counsel said there is no rule that says a
15 foreign customer cannot submit a claim in a SIPC liquidation.
16 That has nothing to do with this.

17 The rule, which the Trustee has enforced vigorously,
18 is that the investor in a feeder fund which was a customer of
19 BLMIS cannot submit a claim in a SIPC proceeding. And that's
20 who the subsequent transferees are. The subsequent transferees
21 who we are moving on behalf of cannot assert claims in the
22 bankruptcy case because they were not customers of BLMIS, and
23 the Trustee, with now the support of this Court and the Second
24 Circuit, established that those subsequent transferees, because
25 they are not customers, cannot assert a claim in a SIPA

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1 proceeding and will never share in any of the recoveries that
2 the Trustee accomplishes by avoiding transfers.

3 The third point is that we heard an astonishing
4 discussion concerning the importance and value of the Fairfield
5 Funds' assertion of claims under the BVI Insolvency Act. I
6 wanted to go back to that.

7 Section 550(a)(1) gives the Trustee the right to
8 recover by avoided transfer from the initial transferee; that
9 would be the feeder fund in these cases. Section 550 says you
10 can't get a double recovery; if you get it from the initial
11 transferee, you can't get it from anybody else.

12 Now, suppose that a judgment is obtained against the
13 feeder fund, against the initial transferee. Why shouldn't the
14 satisfaction of that judgment end the case against the
15 subsequent transferee? The reason it won't end the case
16 against the subsequent transferee, if the Trustee is allowed to
17 assert these claims, is because, of course, the initial
18 transferee turns out to be insolvent. There isn't enough money
19 there.

20 But what happens then? That insolvent initial
21 transferee, in the cases we are talking about, is a foreign
22 entity. It's winding up. Its insolvency proceeding should
23 proceed under the law where it's organized, and I take it that
24 the Trustee's counsel endorses that.

25 Well, if the Trustee gets a judgment against a feeder

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1 fund, an initial transferee, based on the avoidance of the
2 transfer, he becomes a creditor in the foreign solvency
3 proceeding. He will share in any recoveries that the Fairfield
4 liquidator obtains as a result of these things you have heard
5 about under the BVI Insolvency Act. Why isn't that enough?

6 The Trustee is here saying but we're not satisfied
7 with that, because whereas all the other creditors in the BVI
8 insolvency proceeding have to share and share alike, we can go
9 straight to somebody who received a transfer from that foreign
10 entity and we can recover the whole thing ourselves. We can go
11 around the liquidator. We don't have to rely on the
12 liquidator's insolvency proceeding and the liquidator's
13 recovery actions, and we don't have to share with the other
14 creditors. We are going to go straight around the liquidation
15 straight to the remote transferee and recover. That seems to
16 me to put the comity issue in very sharp relief, but I think it
17 also affects the extraterritoriality question, the Morrison
18 question, because in Morrison and in EEOC v. Arabian American
19 Oil, the Supreme Court has made clear that one of the things
20 you think about when you answer the question concerning
21 extraterritoriality is whether you are going to be doing
22 something seriously disruptive to affairs that are supposed to
23 be governed by foreign law. And it seems to me that the
24 Trustee's argument today has demonstrated that the claims they
25 are trying to assert here would have exactly that effect.

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1 Thank you, your Honor.

2 THE COURT: Thank very much.

3 Anyone else on the moving counsel's side who wants to
4 be heard

5 MR. BERMAN: No, your Honor.

6 THE COURT: All right. I will give the Trustee an
7 opportunity to have the final word, if you would like.

8 MS. GRIFFIN: Thank you, your Honor. It will be very
9 brief.

10 Your Honor, I guess all I would ask you to do when you
11 hear these analyses that drill down to these very esoteric
12 issues is to back up and look at the two issues that are before
13 your Honor, and they are is this a domestic application of the
14 Bankruptcy Code to a U.S. debtor to replenish the estate of
15 property that rightfully belongs here, and is the Trustee using
16 the Code as it was intended by Congress?

17 Two, your Honor, just to point out a little factual
18 inaccuracy. In those actions that the Trustee is pursuing
19 abroad, he is bringing claims brought under the U.S. Bankruptcy
20 Code. He is pursuing them in the event -- in the alternative
21 under foreign law in the event that the defendants either
22 default here and -- you know, it is to preserve his rights in
23 case a party tests jurisdiction or the enforceability of a
24 default judgment. And, your Honor, frankly, that is what the
25 defendants are really trying to do here. They are really

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1 trying to cloak what are jurisdictional issues or
2 enforceability issues in the guise of a statutory construction
3 issue, and that is not what Congress intended.

4 Thank you, your Honor.

5 THE COURT: All right. Well, I want to thank all
6 counsel for excellent argument.

7 The Court will take the matter sub judice. Thanks
8 very much.

9 (Pause)

10 THE COURT: So I spoke too soon. There is one other
11 lawyer who wants to be heard.

12 MR. SCHIMMEL: Thank you. Your Honor, I represent
13 CACEIS Bank and CACEIS Bank Luxembourg, which are --

14 THE COURT: You need to identify yourself.

15 MR. SCHIMMEL: Daniel Schimmel, of Kelley Drye &
16 Warren, for defendants CACEIS Bank and CACEIS Bank Luxembourg.

17 I wanted to add one point that goes to the cow example
18 that your Honor raised and one of the cases that's cited in the
19 brief, which is the Midland case. I think that case is
20 actually on point and responds to your question, because it
21 involved a massive Ponzi scheme organized in the United States.
22 The perpetrators of that Ponzi scheme were convicted in the
23 Central District of California. The debtor in that case
24 comprised both entities in the U.S., including California
25 corporations and foreign entities. The transferor was a

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1 Barbados corporation. And the Court in that case looked at the
2 extraterritorial application of the avoidance provisions of the
3 Bankruptcy Code and said they do not apply extraterritorially
4 to these transfers, that the presumption against
5 extraterritoriality applied even though it was a crime in the
6 United States, a Ponzi scheme in the United States, and the
7 debtor comprised some U.S. entities, and the Court looked at
8 where the transfer took place. That was the key factor.

9 THE COURT: All right. Thank you very much.

10 Does the Trustee want to add anything on that?

11 MS. GRIFFIN: Your Honor, that was pre-Morrison and so
12 that would be my only -- was it post?

13 (Counsel conferred)

14 MR. SCHIMMEL: It is pre.

15 MS. GRIFFIN: And, your Honor, if the Court were to
16 apply the Morrison analysis, I think the result would be as the
17 Trustee submits.

18 THE COURT: All right. Thank you all very much.

19 This is an easy case. I'm being asked to make an
20 everyday application that has never been done before, if I
21 understand the competing arguments of counsel.

22 So I will take it sub judice.

23
24 - - -
25