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Madoff Trustee Blasts U.S. Solicitor General

By Bill Rochelle

June 4 (Bloomberg) -- The trustee for Bernard L. Madoff Investment Securities Inc. came out fighting yesterday after the U.S. Solicitor General recommended in May that the U.S. Supreme Court decline to hear an appeal of rulings that barred the trustee's \$10.6 billion in lawsuits against HSBC Holdings Plc, UBS AG and UniCredit SpA.

Madoff trustee Irving Picard contends that the banks kept quiet when they had reason to believe Madoff was orchestrating the biggest fraud in history. Federal district judges in New York dismissed Picard's suits, saying he was barred from suing or didn't have the right to sue based on claims that belong to customers.

The U.S. Court of Appeals in Manhattan upheld the dismissals, prompting Picard in October to seek an appeal before the Supreme Court. In January, the high court asked for an opinion from the solicitor general, who said last month that the lower-court rulings were correct and another appeal isn't warranted.

Picard's brief filed yesterday accused the solicitor general of misreading decisions by other federal appeals courts and saying there is no conflict with their rulings when in fact there is.

In the opening pages of his new brief, Picard bluntly tells the Supreme Court that refusal to hear the case means that customers will lose their last chance to be paid in full on claims amounting to about \$17 billion.

Picard said the lower courts misinterpreted the Securities Investor Protection Act to arrive at a "counterintuitive" reading cutting off a trustee's ability to recover defrauded investors' losses from banks that had good reason to suspect they were aiding fraud.

The trustee told the high court it should hear the "most significant test case" ever regarding SIPA. If the lower courts aren't reversed, Picard said, the precedent will impede customer recoveries for years to come.

The lower courts' rulings "undermine SIPA's deterrent effect," increasing the likelihood that future Ponzi schemes will be unreported because banks can profit "while turning a blind eye to serious red flags," Picard said.

Picard urged the Supreme Court to accept the case and resolve a split among the circuits on the question of when a trustee can sue if all creditors suffered the same injury. Contrary to the analysis of the solicitor general, Picard said that the Court of Appeals in Manhattan is the only one among four federal appellate courts that don't allow a trustee to sue when a claim is common to all creditors.

For details on the solicitor general's brief, click here for the May 28 Bloomberg bankruptcy report. The solicitor general is the branch of the Justice Department that appears for the government in Supreme Court cases.

Picard so far has recovered about \$9.8 billion and distributed \$5.25 billion. He can't distribute \$4.3 billion he's holding in view of disputed claims and money he must retain for issues still in litigation. Customers who invested \$925,000 or less have gotten back everything, aside from fictitious profits.

All money Picard recovers will go to customers because expenses of the liquidation are paid by the Securities Investor Protection Corp.

The Manhattan appeals court ruled last June that Picard couldn't sue because, as trustee, he was tainted by Madoff's fraud and was thus barred from going after any banks that may have enabled the theft. Picard's appeal to the Supreme Court raises only some of the issues decided last year.

Madoff's firm began liquidating in December 2008. Madoff individually went into an involuntary Chapter 7 liquidation in April 2009, and his case was later consolidated with the firm's. He's serving a 150-year prison sentence following a guilty plea.

The case in the Supreme Court is *Picard v. JPMorgan Chase & Co.*, 13-448, U.S. Supreme Court (Washington).

The Madoff liquidation case is *Securities Investor Protection Corp. v. Bernard L. Madoff Investment Securities LLC*, 08-01789, U.S. Bankruptcy Court, Southern District of New York (Manhattan). The criminal case is *U.S. v. Madoff*, 09-cr-00213, U.S. District Court, Southern District of New York (Manhattan).

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