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Memorandum to: Clients and Friends

Madoff and Lehman Brothers:
Two Recent Decisions That May be
Right on the Law, but the Law is not Right

Two recent, widely-publicized decisions in the *Madoff* and *Lehman Brothers* bankruptcies raise troubling questions about the efficiency and fairness of the litigation process in cases of sophisticated securities fraud.

Litigation can be inefficient and unfair? That lead may seem as newsy as “Lindy Has Landed!” Nevertheless, these problems, when encountered, should be pointed out; not ignored as they have been despite the wide publicity of these decisions.

In *Picard v. HSBC Bank PLC*, Nos. 11 Civ. 763 (JSR), 11 Civ. 836 (JSR), 2011 WL 3200298 (S.D.N.Y. Jul. 28, 2011), the trustee for the liquidation of Bernard L. Madoff Investment Securities sought to recover over \$8 billion from HSBC and other defendants for their alleged failure to investigate and expose the Madoff Ponzi scheme that defrauded thousands of investors. The court dismissed the trustee’s claims, holding that he lacked statutory authority to pursue the claims of victimized investors. Without such statutory authority, the trustee was left to rely on the common law under which, as successor to Madoff Securities, he “stood in the shoes” of the debtor firm, not its creditors, and was barred by the common-law doctrine of *in pari delicto* from suing another wrongdoer.

The defrauded investors are not without a remedy. They may engage their own counsel to pursue their claims against third-parties.

The court’s decision is based on well-established precedent that applies not only to liquidating trustees under the Securities Investor Protection Act, but more generally to all trustees in bankruptcy. The decision appears to be correct. But the result makes no sense. The Madoff trustee has reportedly filed more than one thousand lawsuits to recover funds for the estate. These cases are based on expensive investigations of the transactions underlying these cases; investigations that had to be undertaken to assess the estate’s assets and liabilities and to fulfill the trustee’s statutory duty to investigate fraud

