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NATIONAL ASSOCIATION OF FEDERAL EQUITY RECEIVERS

THE RECEIVER

January 2017 | Issue 4

NAFER President's Letter

S. Gregory Hays, NAFER President

It is interesting for me to write an article for *The Receiver* when, for over 25 years, I have consistently referred to one person in business as "The Receiver." I learned the receiver business from my father, William G. Hays, Jr., who served as a receiver in many SEC, CFTC, FTC, and SIPC cases. As a young man, I found it appropriate to refer to him in business discussions as "The Receiver." I could not bring myself to refer to him by his first name, and saying "my Dad" just did not seem to appropriate. Hence, "The Receiver" became a very common phrase.

Though my Dad retired many years ago, lawyers we worked with still refer to him as "The Receiver." I had the office next door from 1990 to 2000, and there was always laughter coming from his office. He took great pleasure in unwinding frauds and was called a "Fraudbuster" by *Forbes*. Dad is now 89, doing very well, and always loves to hear a good receiver story.

Back in his day, little information existed on authority on receiverships, and there was no communication with these other receivers. We all just learned from our own cases. NAFER now provides a voice of wisdom and authority. It has become an outstanding organization where receivers can get to know other receivers and learn from them.

I want to thank NAFER Past Presidents Robert Wing, Steve Donell, and Ira Bodenstein for all their hard work. Serving as President, I now understand just how much time and effort they

What's Inside

NAFER Officers

President
Greg Hays

President Emeritus
Ira Bodenstein

Treasurer
Jeff Brandlin

Secretary
Charlene Koonce

dedicated to growing the respected organization that it is today.

The **Publication Committee** has done a great job on *The Receiver* over the years, but we need more NAFER members to draft articles, provide case reviews, and supply content to make this publication the authority on receivership issues. We must also do more with social media. We also plan to print *The Receiver* and mail it to our judicial and agency contacts to help spread the news on NAFER.

The **Conference Committee** did an outstanding job on the 5th Annual Conference. Thanks to Bob Mosier, Kathy Phelps, Kevin Duff, and the conference committee. The *DailyDac* published a very nice article, rating the conference a "Solid A." (See page 12.)

The **Receiver Training Camp** was a well-received addition to the conference. Attendees had many very favorable comments and requested we make the program longer next year. Plans are underway to expand the content and add additional topics. The initial Receiver Training Camp was just the "First Quarter" of a receivership, and we have a lot of content to add, including managing a receivership case, pursuing litigation, and closing a case.

Our **International Committee** is planning a one-day conference in Grand Cayman on February 8, 2017. This conference is the day before the American Bankruptcy Institute's Caribbean Insolvency Symposium, and several of us are planning to attend both events. We hope you'll join us at our first off-shore event.

The **Best Practices Committee** will be led by member Terry Banich (Shaw, Fishman, Glantz, and Towbin; Chicago). We need more members to assist in drafting Best Practices. Gary Caris (Diamond McCarthy; Los Angeles) wrote a paper on managing real estate, which we will post on the website.

We saw an influx of membership interest after the conference; many applications were received, and the **Membership Committee** is busy reviewing and approving new members. We plan to use the receiver database to contact more new members.

The **Outreach Committee** is working to increase NAFER's visibility by connecting with agency and judicial representatives. Their work has resulted in an increase in both NAFER Judicial and Agency Membership, as well as conference participation. This year, their goal is to offer programs at judicial conferences on receivership issues and to work through agency members to streamline tax and case-closing procedures with the IRS.

The **Website Committee** has many improvements in the works, including a docket that lists articles, pleadings, cases, and other items of interest.

I look forward to being of service as I embark on my role as NAFER President. I welcome your input, recommendations, ideas, and participation.

Greg Hays can be reached via email at ghays@haysconsulting.net.

NAFER Needs YOU!

NAFER's members are the sum and substance of our organization. Our volunteer leaders are the reason we stand apart from all other professional organziations. If you are interested in contribuing to the work of one of our vibrant committees, please contact the committee chair. For a description of the work of each, please visit http://www.nafer.org/Forum
(Please note: Only NAFER members are eligible. Must be logged in to website to see committee descriptions).

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Cayman Insolvency and Asset Recovery Conference

February 8, 2017

The Westin Grand Cayman Seven Mile Beach Resort & Spa | Grand Cayman Island

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February 7, 2017

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The Westin Grand Cayman Seven Mile Beach Resort & Spa

Grand Cayman Island

FEBRUARY 7

Sunset Catamaran Cruise

Sunset Cruise open to registered attendees of the February 8th program plus one guest. Limited capacity; registrations accepted on first-come, first-served basis. Cruise departs from the Westin.

FEBRUARY 8

8 a.m. - 6 p.m.
Cayman Insolvency and Asset Recovery Conference

Visit www.NAFER.org for registration information

Program

8:00-8:30 a.m. Light Breakfast

8:30-8:45 a.m. Welcome

Greg Hays, *Founder & Managing Principal*
Hays Financial Consulting
President, NAFER
Atlanta, Georgia

8:45-10:00 a.m. Law & Liquidation Proceeding Process

Simon Hurry, *Senior Associate*
Stephen Leontsinis, *Partner*
Collas Crill
Grand Cayman

10:30 a.m. - 12:00 p.m. Cayman Insolvency Case Studies

Hugh Dickson, *Managing Director, Recovery & Reorganization*
Grant Thornton Specialist Services
Cayman Islands

Mark Goodman, *Partner, Litigation, Insolvency & Restructuring Group*
Campbells
Grand Cayman

Gregory S. Grossman, *Founding Shareholder*
Astigarraga Davis Mullins & Grossman
Miami, Florida

1:30-2:30 p.m. Methods for Applying US Judgments to Cayman Cash Assets

Paul Richard Brown, *Attorney at Law*
Karr Tuttle Campbell
Seattle, Washington

3:00-4:15 p.m. Panel Discussion: Strategy for Cayman Liquidators Who Deal with US Assets

P. Jason Collins, *Founding Partner*
Reid Collins & Tsai LLP
Austin, Texas

Chip Hoebeke, CPA, CIRA
Principal, Director Turnaround and Receivership
Rehmann
Grand Rapids, Michigan

Chris Kennedy, *Director*
Smith & Williamson
Cayman

Moderator: **Anthony Calascibetta,**
Partner, Eisner Amper LLP

4:30-5:30 p.m. Cocktails & Camaraderie on the Beach

Effective Planning for Asset Recovery

By Paul Richard Brown
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This article is intended to be a summary identifying the general procedure for successful offshore asset recovery, particularly in cases where fraud and concealment are at issue. It is not intended to be a comprehensive and exhaustive analysis of this complex and multilayered matter.

International asset recovery requires planning, persistence, and patience. Your adversary may have had a head start in designing and implementing a plan to conceal, obscure, and pre-position assets and possibly even change their character from cash to precious metal to rare gems and back again. It will take time to find and follow the branches of an asset trail and there may well be false starts and intentional misdirection along the way. Untangling a sophisticated web of money-laundering or other asset movement takes time and skill particularly in foreign jurisdictions. These issues are best managed by a well-conceived, three phased approach including: (1) understanding the scheme and initial movement of assets offshore and identifying specific assets in particular institutions or locations; (2) assessment and execution of sovereign laws affecting discovery and recovery; and (3) liquidation and/or repatriation of assets for the benefit of creditors.

Typically, these matters involve some form of financial fraud. Fraud factors to examine include the following: (a) significant related-party transactions; (b) inadequate segregation of duties; (c) management by single person or small group; (d) reliance on investment by word-of-mouth; (e) use by promoters of small cap stocks; and (f) simply hiding assets from legitimate and lawful creditors, such as an ex-spouse, business partner, or third party investor.

As noted above, the three phased process for successful offshore asset recovery generally entails the following:

1. Understanding Scheme and Movement of Assets: this task includes the evaluation of assets and misappropriated funds; identification of concealment techniques and accounts or instruments used to hold and move assets; discovery of potential third-party facilitators (including determining if they are insured); and ascertaining bank secrecy and legally-imposed confidentially requirements of particular foreign jurisdictions. There are no uniform rules on confidentiality. Some courts base what law applies upon the substantial relationship with the jurisdiction where the claim arose.
2. Assessment of Issues Affecting Discovery and Recovery: for this part of the process, lawyers should take the following steps to determine if there are common tools to obtain verifiable evidence; analyze jurisdictions involved and examine if those jurisdictions are favorable to recovery; evaluate issues of legal reciprocity and mutual assistance agreements; where appropriate, use Letters Rogatory and Norwich Pharmacal (case law discussed below) to collect verifiable evidence; further exam the potential utilization of jurisdictions' Financial Fraud or Investigative Units; and examine if Mutual Legal Assistance Treaties can be useful to obtain financial records.
3. Liquidation/Repatriation of Assets: the lawful creditor (legal title holder of the assets) is entitled to assets when debtor's transfer or concealment was an attempt to conceal, hinder, delay or defraud creditors. The creditor obtains an attachment order prohibiting debtor from disposing of assets and requiring repatriation.

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General International Discovery Procedures (available to US parties with foreign counsel assistance)

A. Letters Rogatory

The Letter of Request Procedure is the main means of evidence gathering under the Hague Convention. It is the Hague Evidence Convention. It defines methods for foreign discovery for 49 countries that have adopted the Convention. It allows judicial authorities for one signatory country to obtain evidence located in another signatory country. This process begins with a request made to the domestic court where the action is pending to issue a Letter of Request seeking the production of specified documents or the taking of testimony from a particular witness. The court transmits the Letter of Request to the central authority, a governmental agency responsible for receiving and overseeing execution of Letters of Request, which then transmits the Letter of Request to the court in the jurisdiction where the evidence is located. The foreign court then conducts an evidentiary proceeding and sends the results directly back to the court that issued the Letter of Request.

"The discovery method known as Norwich Pharmacal, coupled with a gag order...is very helpful in bank-secrecy jurisdictions."

B. Mutual Legal Assistance Treaty

A Mutual Legal Assistance Treaty (MLAT) is a treaty which creates a binding obligation on treaty partners to give assistance to each other in criminal investigations including fraud and certain civil and administrative matters. The treaty typically provides for a direct exchange of information between two "central authorities" — the U.S. Department of Justice and its foreign counterpart, bypassing the involvement of a U.S. court, but not necessarily a foreign court. Legal assistance covers the freezing of assets, the summoning of witnesses, the taking of testimony, the compelling the production of documents and other evidence, the issuance of search warrants and the service of process.

C. Norwich Pharmacal

To discover otherwise private or protected information, English law offers a remedy based on the case of Norwich Pharmacal Company v. Commissioner of Custom and Excise. The US has entered into MLAT treaties with more than 45 countries, including many islands in the Caribbean that are known tax havens. The discovery method known as Norwich Pharmacal, coupled with a gag order, offers a means to obtain information by court order without the threat of violating a duty of confidentiality owed by a third party and without notifying the target of the inquiry. This is very helpful in bank-secrecy jurisdictions. The Norwich Pharmacal decision was in 1973 and has been developed by English common law or adopted in some occasions statutorily in countries. It enables the discovery of bank account information, correspondence, company and trust information and corporate records with an eye on secrecy.

D. Anton Piller – English Law

Anton Piller allows for limited discovery prior to commencement of an action. Anton Piller was decided in 1976. It applies in English common law countries. The party who is a beneficiary of an Anton Piller order has the right to seize and secure evidence on certain terms. The evidence is held so that the process of the court is no rendered useless. To obtain an Anton Piller order, the victim must show that he or she had a business relationship with the defendant, and that the defendant is likely to be in possession of documents that can help prove the claim, such as bank account statements, letters to and from the victim, and internal memos.

E. Freezing Orders - Mareva Injunction

Once assets are discovered, efforts must be focused on freezing and seizing them.

Through relief known as a Mareva injunction, courts have issued injunctions to freeze assets in the possession of third parties in foreign countries. Mareva case decided in 1980. To obtain a Mareva injunction, an applicant must show a good arguable case and serious risk that the respondent will either remove assets from the jurisdiction or dissipate them so as to frustrate any judgment ultimately obtained. Since its inception two decades ago, the Mareva injunction has become an important and widely used tool in civil litigation. A Mareva injunction enables the seizure of assets so as to preserve them for the benefit of the creditor, but not to give a charge in favor of any particular creditor.

Conclusion

Utilizing the above three phased approach and discovery provides a thought out purposeful methodology for successful pursuit of assets offshore. Indeed, proper and timely execution is paramount to success. Understanding the varied legal terrain and political nuances still has its challenges to success, which ultimately is lawfully seizing assets.

Exciting New Partnership with Leading Distressed Deal Database: DailyDAC

NAFER is pleased to report that it recently entered into a partnership with DailyDAC, LLC whereby NAFER will share 15% of the price of every ad DailyDAC sells to a NAFER member.

DailyDAC has operated its "Opportunistic Deal Database ('ODD')," which aggregates potential deals for investors focused on distressed businesses and business assets, since 2010. Because of the success of its ODD, coupled with the vast educational content that resides on its website, its traffic mushroomed to the point that the weekly newsletter now has about 20,000 subscribers.

Earlier this year, DailyDAC launched a second service, its "Premier Public Notice ('PPN') Service." Unlike the ODD, which exists behind a pay wall for only paying members to see, DailyDAC's PPN service publishes notices of sales by receivers, assignees, secured lenders, bankruptcy DIPs, and trustees that are totally accessible to DailyDAC's approximate 20,000 newsletter subscriber and to anyone who happens upon DailyDAC's website.

The partnership "comes at a convenient time," notes NAFER president Greg Hays, "given recent case law that increasingly calls into question whether newspaper notice can always be relied upon to constitute commercially reasonable notice to the extent it once was." An interesting article (albeit potentially biased, given that it was co-authored by DailyDAC CEO Christopher Cahill and DailyDAC founder Jonathan Friedland) can be read here.

The DailyDAC PPN service costs $800 for a one week listing (in both its weekly newsletter and on its website) and an additional $250 per week thereafter. Again, DailyDAC pays 15% of the price to NAFER anytime a NAFER member purchases a PPN ad.

Another significant benefit for NAFER members is that when a receivership estate does not have the cash to pay for an ad prior to an asset sale, DailyDAC will defer payment until closing of such sale. "This was actually a far more important attribute of NAFER's agreement with DailyDAC than was the revenue share," explains Hays, "the fact of the matter is that receivership estates commonly have little-to-no cash before significant asset sales can take place. I have recently used this benefit in an insolvent receiver estate and appreciate DailyDAC's understanding and willingness to work with our members in this regard."

First Receiver Training Camp Scores a Touchdown!

By Kathy Bazoian Phelps, Attorney at Law
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NAFER strives to offer better programs each year for both veteran receivers and those wanting to learn about federal equity receiverships. This year's annual conference offered a new format of teaching intended for beginners, entitled "Receiver Training Camp: Scores of Tips from the Federal Equity Receiver Playbook." The panel consisted of NAFER's past presidents – Robert Wing and Stephen Donell; its then current president – Ira Bodenstein; and its incoming president, Greg Hays. Kevin Duff and Kathy Bazoian Phelps served as the moderators.

The program took place the day before the annual conference's regular programs and ended just before the opening reception began on October 13, 2016, in Washington D.C. The room designated for the Training Camp at the Mayflower Hotel was at capacity, with about 70 attendees participating. Young recruits, veteran receivers, judges, and retired judges alike attended with enthusiasm to soak up the wisdom of the panelists, each of whom are well-experienced receivers.

The format of the Training Camp was intentionally different than NAFER's traditional panel presentations at the day and a half of the regular conference. Tip by tip, the panelists offered very specific and practical advice of what to do, and what not to do, in different scenarios that arise at the beginning of a receivership case. Since this first year of Training Camp was just two hours,

NAFER past presidents Robert Wing (2010 - 2012), Steve Donell (2012 - 2014), and Ira Bodenstein (2014 - 2016) welcome newly-elected president Greg Hays (2016 - 2018) to the "team."

the program was limited to just the issues arising at the beginning of a case, with practical pointers, war stories, and pitfalls being provided on the following topic areas:

- Pre-appointment: Developing a Game Plan
  - Internal investigation
  - Public searches
  - Building a receivership team

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- First Day Issues
  - Securing the assets
  - The initial interviews
  - Providing notice of the receivership
  - Preserving evidence
- Business Operations
  - Immediate operational needs
  - Longer term issues
  - Ancillary businesses
- Communications
  - With investors
  - With employees, vendors and others
  - With appointing agency
  - With Court
- Immediate Accounting Issues
  - Take control of the records – internal and third party
  - Establish receiver's accounting books
  - Prepare budget
  - Evaluate status of tax issues and returns
  - Prepare and maintain sources and uses database

These issues, of course, only cover "the first quarter," and a deeper dive into the panoply of issues arising in a receivership case as the game advances will be the subject of future training camps in the years to come. Next year's Training Camp is already in the planning stages and will take us through at least the "first half." The program will again provide fundamental tips for those new to receiverships, novel ideas for even the most experienced receivers, and an introduction to the complexities of receivership administration for judges who otherwise are not exposed to the inside track.

Referees blow the whistle on participants of NAFER's Inaugural Receiver Training Camp! Pictured (left to right): Kevin Duff, Co-Moderator; Ira Bodenstein, President Emeritus; NAFER Executive Director, Maureen Whalen; Past President, Steve Donell; newly elected president, Greg Hays; and Co-Moderator, Kathy Bazoian Phelps.

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The Receiver Interview with Greg Hays

By Henry Sewell, Attorney at Law
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The following is the initial "The Receiver Interview" which will be a regular feature of *The Receiver* going forward. For each issue, we will interview a NAFER member and share information and stories about their practice.

This issue's subject is S. Gregory Hays, the newly installed President of NAFER. Greg is the Managing Director of Hays Financial Consulting LLC, a financial consulting firm he founded 16 years ago in Atlanta, Georgia. Greg is a life-long resident of Atlanta and lives in the Buckhead area with his wife Annette and their three children. He has a Bachelor's Degree from Stetson University and an MBA in Finance from Georgia State University.

How long have you been a member of NAFER?

I participated in the SEC Receiver Roundtable from 2007 to 2010. Some of the receivers in the group were founders of NAFER and I joined in 2011. I have been to all five conferences and have served on the Board since 2012. I am involved in several professional organizations and NAFER is by far my favorite organization. For me, it is just fantastic to be around other professionals that do what we do and hear how they manage receivership issues and I enjoy sharing what we have learned over the years.

How did you become involved in the receivership practice?

It was the family business. My father, William G. Hays, Jr., began serving as a Receiver and a Bankruptcy Trustee in the mid-1970's and continued his practice into the early 2000's. When I was in high school I interned for a company involved in a major offering fraud where my father served as CEO for the trustee. I also worked for him in another bankruptcy case one summer during college. Family dinners often include war stories. I knew I wanted to work in this field, but wanted to see how businesses were supposed to run and after graduate school, I went to work for two of Atlanta's largest companies, Cox Communications and The Coca-Cola Company. In 1990, I went to work with my father's firm on a full time basis and established my own firm in 2001. I feel like I have been in the trustee and receivership world my whole life.

When was the first time you were appointed as a Receiver?

In 2002, I was appointed as a Receiver for a large hair salon. I spent many frustrating hours mediating trivial disputes between the owners, but being able to put on my resume that I was actually appointed as a Receiver helped me get my second appointment in *SEC v. Mobile Billboards* which was an $80 million Ponzi scheme. I always tell people interested in this field to take that first case no matter how small or difficult just to be able to say you are a Receiver.

What was your favorite receivership case?

SEC v. Albert Parish in Charleston, South Carolina. Al Parish, who is now in prison with Bernie Madoff, was a well-known economist and college professor in Charleston who invested money for his college and many individual investors. He was a very flamboyant person who lived an extravagant lifestyle, funded by investor money. He wore loud and brightly colored suits, drove a purple, convertible Jaguar with a camouflage covered roof and wrote the investment advice and economic articles for the local paper. He had a "hard asset fund" where he simply bought stuff he liked including pens, watches, jewelry and art. Parish acquired over 2,000 items for which he paid over $25 million. The first month of the case included going through his 12,000 square foot home where we found Mont Blanc pens including one encrusted with 1,400 diamonds for which he had paid $175,000. We also found gold coins, $2 million in watches and a lot of art work and antiques. We had an antique tea pot that he paid $1 million for. We literally went through every drawer and piece of clothing and the people of Charleston were fantastic and called with leads on various assets he

had given away. I spent several months tracing art, antiques, vintage guitars, and other hard assets he had purchased from galleries across the country. I hired an art expert to assist me in identifying the value of assets. Auctioning these assets was a real challenge and we rented the Charleston civic center for a two day auction of everything he owned. The case was extensively covered in the local news media and ended up with my two favorite headlines: "Treasure Hunt" where the local paper described my extensive asset searches, and "Al Parish: A Buffoon or Criminal Mastermind" where the paper described Parish's lifestyle and activities. The Defense was that he was just a buffoon who got in over his head and the art dealers took advantage of him. *American Greed* produced a story on this case in 2009.

What was your scariest moment as a Receiver?

My lawyer, David Dantzler, and I had finished deposing the brother of the Defendant in a Ponzi Scheme in Virginia City, Nevada. It had been a long day and this person finally admitted in the deposition that the funds from the scam were invested in gold mines around Virginia City. He then drove us to a gold mine in his Suburban and as we got close to the mine he drove straight towards a cliff. He literally drove to the very edge of the cliff and both David and I thought he was going over and taking us with him. My hand was on the door handle. We laugh about it now, but we were pretty scared at the time. The other scary time was also in Nevada, where the president of the company asked if he "could carefully remove the gun" which was fully loaded with no safety and mounted and hidden underneath his desk pointed where I had been seated. Two big lessons: Never let the crook drive you anywhere and inquire about any weapons on the premises are as soon as you take over a company!

What is your pet peeve as a receiver?

The most frustrating part about every case is holding distributions for as long as eighteen months in order to ensure that the IRS has no claims. We really need to find a way to deal with this so the audit time for Receivers is similar to the 60 days for Bankruptcy Trustees pursuant Section 505 of the Bankruptcy Code. I am working with several NAFER members and have spoken to several appointing agencies about assisting us in pursuing this change with the IRS.

What were your some of your funnier moments as a Receiver?

I can tell stories all day about the cases and characters we have seen. One of my favorite scams involved a guy that sold ginseng as fake Viagra, called "Vagra", at the same time Viagra was being introduced to the market. Customers demanded we let them buy the product even after the FTC exposed it as a fraud. Another treasure hunt fraud case had a $100 investment with a guaranteed payout of $200,000 on Aprils Fools day. I had another case where the principals made their investment decisions based on gravitational forces and raised over $20 Million in just a few months. The mastermind wrote a novel based on the scam which can still be purchased on Amazon. The Al Parish case was just amazing. The beauty of being a receiver is taking over a new situation, learning about a new industry, and meeting a whole new cast of characters.

How many Charles Ponzi bobbleheads have you given out?

I started giving them out during presentations on Ponzi Schemes about ten years ago and have given away over 2,000. People often come up to me at conferences and say they have the bobblehead on their desk. When I am in other people's offices, I often see the Ponzi bobblehead. It has been a funny marketing gimmick.

What is your favorite Ponzi quote?

In 1920 there was an article about Charles Ponzi where the author said: "This baby turns decimal points into commas on almost any bank book." That simple concept is the basis of every scam I have unwound.

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Premium Public Notice Service

What is DailyDAC's Premium Public Notice Service?

Our service enables fiduciaries (e.g., federal equity receivers, chapter 11 debtors-in-possession and committees, trustees, assignees) and secured lenders who must sell assets to target a very large and relevant group of potential bidders. A PPN ad will also help your sale withstand a later argument that your notice was not commercially reasonable.

How much does a PPN ad cost?

Pricing is straightforward and far less expensive than newspaper advertising: an ad for a single auction costs $800 for one week. Each additional week is only $250. Because of our unique partnership with NAFER, NAFER receives a percentage of all revenue on any ad placed by a NAFER member. A PPN ad is the smart supplement to your sale notice strategy!

How do I place an ad?

Placing a PPN ad is fast and easy. Ads are published on our websites within one day of being accepted for publication and are published in the DACyak Weekly Digest, an e-newsletter that goes out to approximately 20,000 opt-in subscribers who have demonstrable interest in seeing such information.

To submit an ad, send an email to info@financialpoise.com.
Or call us at 312-469-0135.

CONFERENCE REVIEW: NAFER Fifth Annual Conference, Washington D.C., Oct. 13-15, 2016

Originally published at https://www.dailydac.com.

DailyDAC Editorial Staff attended the fifth national conference of the National Association of Federal Equity Receivers (NAFER), held at the historic Mayflower Hotel in our nation's capital, on October 13-15.

This conference earned a solid "A" from DailyDAC.

The audience at the three day conference was composed largely of receivers, professionals who represent receivers, and federal judges. For newbies, the conference opened with a two-hour session entitled Receiver Training Camp, led by two past presidents of NAFER (Robert Wing and Steve Donell) plus presidents outgoing (Ira Bodenstein) and incoming (Greg Hays).

Pictured, left to right: Conference Chair Robert Mosier, President Emeritus Ira Bodenstein, and special presenter Irving Picard take a moment to thank Diamond Sponsors Katrina McLean, Victor Owens, Richard Arbuckle, and Marchand Boyd of East West Bank

Another highlight was "John X. Pert On the Stand: The Mock Direct and Cross Examination of a Forensic Accountant to Prove the Ponzi Scheme." This was pedagogically sound and great fun. Could the receiver's counsel (played by Gary Caris, of Diamond McCarthy, who once recovered assets in Latvia) establish that the business was a Ponzi scheme and thus enjoy the "Ponzi presumption" and that he therefore could be relieved from proving intent in fraudulent transfer actions? Here the problem was the defendant's expert witness (played by frequent expert witness Gil Miller of Rocky Mountain Advisory LLC) and his counsel (played by the Hon. Stephen Rhodes (ret.)). Hon. David Carter (C.D. Cal.) played the judge, donning a crown for his deliberations (it was a close call).

Kathy Bazoian Phelps (Diamond McCarthy) produced the panel. She and Judge Rhodes have authored the authoritative work on Ponzi schemes, The Ponzi Book: A Legal Resource for Unraveling Ponzi Schemes (Lexis Nexis 2016). A beautiful Charles Ponzi bobblehead doll was distributed to each conference attendee.

Other panels included:

- "International Asset Recovery," in which Alex Moglia (Moglia Advisors). Jack De Kluvier (US Dept. of Justice), Mark McDonal (Grant Thornton, BVI), David Molton (Brown & Rudnick LLP) and Eric (Rick) Rein (Horwood Marcus & Berk Chtd.) discussed getting money and property that is resident outside of the US (this would be good to know!), while fostering cooperation with foreign governments, financial institutions, and professionals.
- "The End Game: Fairness in Distributing Receivership Funds," which featured Kevin Duff (Rachlis Duff Adler Peel & Kaplan, LLC), Richard Foelber (CFTC), Marion Hecht (Clifton Larson Allen), Martha Massey (SEC), and Burt Wiand (Wiand Guerra King P.A.).
- Communication is Key: But Receivers Must stay Within Ethical Boundaries," which featured Ira Bodenstein (Shaw Fishman Glantz & Towbin), John M. Breen (University of Chicago Law School), Stephen Harbeck (SIPC), Kristin Murnahan (SEC), and Henry Sewell (Law Offices of Henry F. Sewell Jr., LLC).
- "Money, Money, Money: Tax, Insurance, Expenses and Reporting," which featured Andrew W. Caine (Pachulski Stang

NATIONAL ASSOCIATION OF FEDERAL EQUITY RECEIVERS

Ziehl & Jones), Mark Dottore (Dottore Companies), Byron Moldo (Ervin Cohen Jessup, LLP), and Irving Picard (Baker Hostetler).

- The concluding "Judges Panel" featured Robert Mosier (Mosier & Company) as moderator, with Hon. David Carter (C.D. Cal.), Hon. Darrin Gayles (S.D. Fla.), and Hon. Robert Shelby (D. Utah), who spoke of the duty of receivers and their lawyers to educate judges on what powers can be wielded and how, and of the perplexity for judges in the receivership case (who appoint the receiver and consult with the receiver) of presiding over lawsuits initiated by the receiver in order to amplify the funds available for victims of fraud, etc., and of presiding over criminal cases of persons against whom related civil cases are pending.

Kathy Bazoian Phelps (far left) moderates "John X. Pert on the Stand: The Mock Direct and Cross Examination of a Forensic Accountant to Prove a Ponzi Scheme."

The Keynote was delivered by Lois C. Griesman, Associate Director, Division of Marketing Practices, the U.S. Federal Trade Commission, who led listeners into the processes of the Commission and emphasized the animating purposes of the Commission as it gathers evidence and then decides whether to seek appointment of a receiver.

Doug Bradley of Diamond Sponsor Company BMS takes a moment to enjoy the company of NAFER Board Member and Conference Programs Co-Chair Kevin Duff, and fellow conference sponsor Chris Cahill, CEO of DailyDAC, LLC d/b/a/ Financial Poise.

We found the written conference materials to be ample, pertinent, and well-organized. They were downloadable from an app provided by NAFER – ever oriented toward practical problem-solving, as are its members.

Kudos to outgoing NAFER President, Ira Bodenstein of Shaw Fishman Glantz & Towbin LLC, Conference Chair Robert Mosier, and NAFER Executive Director, Maureen Whalen (of MCorr Consulting) for their great work in putting together such a lively and highly substantive conference. We look forward to the national conference, the several regional conferences, and other programming that NAFER will produce over the next year under the presidency of Greg Hays (Hays Financial Consulting, Atlanta, GA).

To review, a federal receivership is an equitable remedy employed to protect the interests of persons and entities harmed or potentially harmed by a business or property that is subject to federal jurisdiction. Federal district courts appoint federal receivers at the request of harmed persons (like creditors or defrauded parties) or of federal regulatory entities, like the Securities and Exchange Commission, the Federal Trade Commission, and the Commodities Futures Trading Commission, which represent the diffuse interests of people protected by federal laws and regulations.

The federal receivership remedy is not well known even among insolvency professionals – though it has grown in use in recent years and we anticipate that its use will continue to grow. A federal receiver can quickly and efficiently gain control over a defaulting or fraudulent business in order to maximize returns to the receivership's beneficiaries. Federal receiverships are often imposed on businesses that engaged in Ponzi schemes and other securities fraud.

See more pictures from the conference on page 23.

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It's a Fraud, It's a Scam, It's a Ponzi-Like Scheme: The Legal Definition of Labeling a Scheme a Ponzi

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In the wake of some of the largest Ponzi schemes in history, the use of the term "Ponzi" to describe a fraudulent scheme has become more prevalent over the last decade. In certain instances, the term "Ponzi" has been used improperly by the media to describe a situation that does not satisfy the legal requirements to be classified as a Ponzi scheme and is better characterized simply as a fraudulent scheme. In other instances, "Ponzi-like" has been used to describe the "Rob Peter to Pay Paul" pattern utilized in a classic Ponzi scheme where the fraudster uses funds from new investors to pay earlier investors.[2] The term "Ponzi-like" has also been used recently to describe a wide variety of frauds[3] to make them sound more sophisticated. Furthermore, an increasing number of fraudulent schemes have been characterized by regulators, prosecutors, and fiduciaries as "Ponzi-like," "Ponzi-type," or "Ponzi in nature" as part of the assertion of claims against a fraudster or efforts by fiduciaries to recover funds for the benefit of victims of the scheme.[4]

While some have argued that characterizing a scheme as Ponzi-like implicitly means that the scheme is not a Ponzi scheme,[5] the full ramifications of characterizing a scheme as "Ponzi-like" are uncertain. After providing an overview of a classic Ponzi scheme and an important byproduct of establishing a Ponzi scheme, this article will summarize certain authority related to the treatment of fraudulent schemes that do not constitute a classic Ponzi scheme, but rather are characterized as a "Ponzi-like" scheme.

Overview of a Classic Ponzi Scheme

The term "Ponzi scheme" originates from the fraud perpetuated by Charles Ponzi in the 1920s in which Ponzi used funds from later investors to pay earlier investors after promising above market returns for purported investments in postal coupons that were never actually purchased.[6] Despite such clear origins, a classic Ponzi scheme is difficult to define because there is no clear and consistent definition of the term between various courts[7] or an "absolute list of required elements."[8] Although all Ponzi schemes involve fraud, not all fraudulent schemes are Ponzi schemes.[9]

To determine whether a classic Ponzi scheme exists, courts typically "look for a general pattern, rather than specific requirements."[10] A key factor within the general pattern is whether the "scheme involves an enterprise which makes payments to investors from money received from more recent investors, rather than from profits of a legitimate business enterprise."[11] Indeed, a Ponzi scheme has been described as a series of fraudulent transfers resulting from the diversion of proceeds from new investments to pay earlier investors in order to cultivate the illusion of a profit making business and encourage further investment.[12]

In *SEC v. Management Solutions, Inc. (MSI)*, the United States District Court for the Central Division of Utah conducted an extensive review of the various and sometimes conflicting definitions of a Ponzi scheme in different courts.[13] The court in *MSI* noted that all of the definitions tend to include that: "a Ponzi scheme is a fraudulent investment scheme in which 'returns to investors are

not financed through the success of the underlying business venture, but are taken from principal sums of newly attracted investments.'"[14] The presence of investors is one factor that differentiates a Ponzi scheme from general fraud.[15] A more expansive definition of a classic Ponzi scheme will typically include: deposits from investors; "little or no legitimate business operations as represented to investors; the purported business operation produces little or no profits or earnings, the source of the funds being new investments by subsequent investors; and the source of payments to investors is cash infused by new investors."[16] A Ponzi scheme has also been described as an investment fraud with little or no legitimate operations or earnings despite representations to the contrary whereby high returns are often promised and deposits from new investments are used to pay fictitious returns on earlier investments.[17] "A pyramid scheme is similar to a Ponzi scheme, the difference being that investors in a pyramid scheme expect 'to profit from their efforts at obtaining new people to invest in the business into which they have already invested their own money[,]' rather than from the business itself."[18] In certain instances, a scheme may allegedly constitute a Ponzi/pyramid scheme.[19]

Different courts consider various factors in determining whether a scheme qualifies as a Ponzi scheme. For example, courts have considered, among other factors, the following:

- the promise of large returns, returns with little to no risk, and/or consistent returns;[20]
- "the delivery of promised returns to earlier investors to attract new investors;"[21]
- "the general insolvency of the investment scheme from the beginning;"[22]
- whether the perpetrator had any legitimate business operations;[23]
- whether the perpetrator recruited agents and paid brokers high commissions to induce them to continue the scheme in some cases with a commission structure to discourage withdrawals;[24]
- whether funds from investors were commingled, used for non-customer purposes, subject to excessively large fees and/or not invested in promised investments;[25]
- inconsistencies between statements issued by the perpetrator and actual bank statements and/or reports from the perpetrator of overstated investment returns in conjunction with understated losses;[26]
- whether all investors were encouraged to reinvest and extend their investments and later investors received lower returns than earlier investors;[27] and
- "the secrecy, exclusivity, and/or complexity of the investment scheme . . . and the general stability of the investment scheme, among other factors."[28]

Various types of purported operating companies have been labeled classic Ponzi schemes. The most famous classic Ponzi scheme may be the scheme involving Bernard Madoff in which an investment advisory firm registered with the Securities and Exchange Commission claimed to offer large and consistent returns, but in reality never actually invested customer funds and used funds from new investments to pay withdrawals and fictitious profits of other customers.[29] In addition to investment management firms,[30] companies in the following industries have been subject to allegations of operating a Ponzi scheme: payroll services;[31] mortgage brokerage;[32] animal breeding;[33] entertainment;[34] leasing and/or financing;[35] real estate;[36] coin sales;[37] and energy.[38]

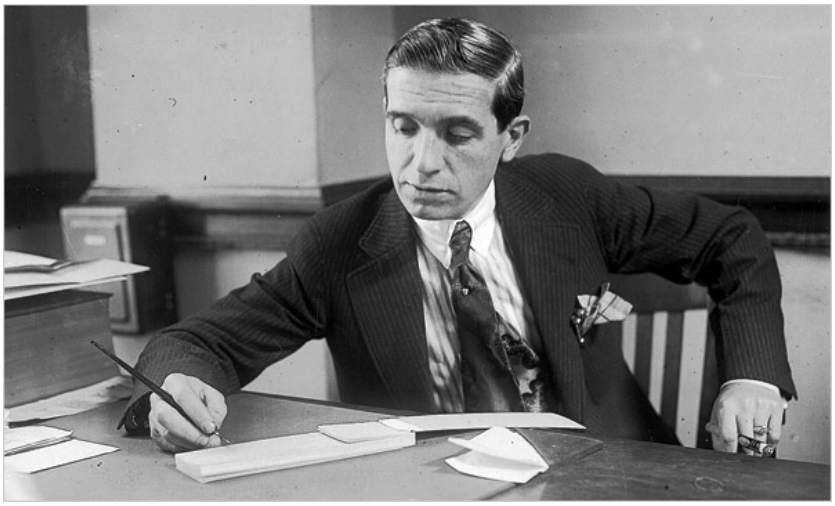
Classification of Scheme and the Ponzi Presumption

The collapse of a fraudulent scheme often results in a bankruptcy, receivership, or other liquidation proceeding in which a receiver or trustee is tasked with administering an estate. Often, fraudulent transfer claims comprise the primary mechanism by which victims of the fraud may receive a recovery.[39] Pursuant to 11 U.S.C. § 548 and similar state law statutes, a fiduciary may generally seek to avoid a transfer made with the actual intent to hinder, delay, or defraud creditors of the debtor.

Proving that a transfer was made with actual intent is often a difficult and time-consuming task that involves establishing certain badges of fraud to demonstrate actual intent for *each* alleged

fraudulent transfer.[40] In cases involving transfers from a Ponzi scheme, however, some courts have relied on the Ponzi presumption to assume that all transfers in furtherance of the scheme were made with fraudulent intent in satisfaction of the proof requirements of a fraudulent transfer claim.[41] The Ponzi presumption greatly simplifies the unwinding of a fraudulent scheme by placing the burden on the transferee to demonstrate a defense to liability.[42]

"The classic case where a 'Ponzi presumption' is available is a fraud from the beginning, no assets other than investor contributions, no legitimate business, commingled investment funds, and preferential transfers to early investors from the contributions of subsequent investors."[43] Actual fraudulent intent may be presumed in instances where a debtor operates a Ponzi scheme or a similar illegitimate enterprise since the transfers made during the course of such an operation could not have a purpose other than to delay, hinder, or defraud creditors.[44] Given that the ability to continue to obtain an increasing amount of new funds is ultimately limited, courts recognizing the Ponzi presumption find that the intent to hinder, delay or defraud can be inferred because the perpetrator of a Ponzi scheme is deemed to know that the scheme will eventually collapse and that certain investors will lose money when the inflow of new funds is insufficient to satisfy withdrawal requests.[45]



Charles Ponzi bilked investors out of $20 million dollars by promising huge returns when in reality, he paid early investors with money from later investors.

While some courts have declined to recognize the Ponzi presumption,[46] many courts have adopted the Ponzi scheme presumption.[47] As plaintiffs have attempted to apply the Ponzi presumption to various kinds of fraudulent schemes, courts have struggled with the boundaries of the presumption. Indeed, some courts have narrowly defined a Ponzi scheme and limited the application of the Ponzi presumption while others have adopted a more expansive approach.

Treatment of Scenarios That Do Not Constitute a Classic Ponzi Scheme

Attempts by regulators and fiduciaries who describe cases as "Ponzi-like" in order to expand the presumption of actual intent to Ponzi-like schemes have experienced mixed results. Some commentators and defendants adopting a restrictive view have argued that the court-fashioned presumption of actual intent to defraud should not be applicable to all "Ponzi-type" schemes. Parties adopting a restrictive view generally reason that the presumption "should be limited to those situations where it is unmistakable that the debtor purposely orchestrated a scheme which, by its very design, could only serve to defraud investors."[48] With such considerations in mind, the following issues may be relevant in an analysis of a fraudulent scheme that may not constitute a classic Ponzi scheme, but is instead characterized as a "Ponzi-like" scheme.

Recognition of "Ponzi-Like" Schemes

Some courts have recognized that certain schemes may be characterized as "Ponzi type" schemes[49] and indicated a willingness to expand the presumption of actual intent outside of a traditional Ponzi scheme[50] and to "Ponzi-like" schemes.[51] As one court noted, the reasoning underlying the conclusion that any transfer made to continue a fraudulent operation is made with actual intent to defraud "applies whether the organization neatly fits within a judicially constructed definition of

Ponzi scheme or was a fraudulent scheme that had some, but perhaps not all, attributes of the traditional Ponzi scheme."[52] Some courts refer to the application of the presumption of actual intent in cases involving Ponzi schemes and "similar illegitimate enterprises."[53]

Application of Broadened Definition of a Ponzi Scheme

A party may attempt to seek the application of a broadened definition of a Ponzi scheme depending on the circumstances of a case.[54] In *Bayou Superfund, LLC v. WAM Long/Short Fund II, L.P. (In re Bayou Group, LLC)*, the Bankruptcy Court for the Southern District of New York rejected a restrictive definition of a Ponzi scheme that limited a Ponzi to an operation promising high returns with no legitimate business activity and no opportunity for repayment of later investors.[55] The court reasoned that "the label 'Ponzi scheme' has been applied to any sort of inherently fraudulent arrangement under which the debtor-transferor must utilize after-acquired investment funds to pay off previous investors in order to forestall disclosure of the fraud."[56] Accordingly, "where funds acquired from the later investors are used to make payments to earlier investors in redemption of impaired or non-existent account balances and fictitious profits, 'actual intent' to hinder, delay and defraud is presumed."[57] Furthermore, the Bankruptcy Court for the Southern District of New York has also indicated that when a debtor "makes a payment with the knowledge that future creditors will not be paid, that payment is presumed to have been made with actual intent to hinder, delay or defraud other creditors—regardless of whether the payments were made to early investors, or whether the debtor was engaged in a strictly classic Ponzi scheme."[58]

Courts have also invited the broadening of the term "Ponzi scheme" to cover other types of business ventures.[59] In *Forman v. Salzano (In re NorVergence, Inc.),* the bankruptcy trustee alleged that the scheme operated by the debtor resembled and was so akin to a Ponzi or Bust-Out scheme that the actual intent element of any fraudulent transfer was not debatable.[60] Pursuant to the scheme in *NorVergence*, certain communication equipment leases with customers were monetized to acquire funds that were subsequently expended to capture new customers, pay personal expenditures, and pay purported returns to earlier customers.[61] In denying a motion to dismiss without resolving whether the trustee could pursue the Ponzi scheme route, the court in *NorVergence* recognized that "a clever twist on the Ponzi concept will not remove a fraudulent scheme from the definition of Ponzi."[62] Not only did the court recognize that an elaborate scheme can still be within the definition of a Ponzi, but the court in *NorVergence* went even further in noting that "even if Debtor's business operations do not exactly match the description of a Ponzi Scheme, the Trustee can still continue to characterize the business model as a Ponzi Scheme."[63] *NorVergence* has been cited favorably by courts considering an alleged "Ponzi-like" scheme for the proposition that similar operations may be characterized as a Ponzi scheme to demonstrate the intent necessary for a fraudulent transfer claim.[64]

Evidentiary Burden

Not surprisingly, cases involving an alleged "Ponzi-like" scheme are often determined based on whether the plaintiff has proffered sufficient evidence to demonstrate that the scheme was operated like a Ponzi scheme.[65] For example, in *American Cancer Society v. Cook,*[66] the district court originally accepted the presumption of fraudulent intent that was created upon the finding that the oil-based fraudulent investment scheme under consideration was operated as a "Ponzi-like" scheme.[67] The Fifth Circuit, however, rejected the application of the presumption because the only evidence presented was a conclusory affidavit of the receiver that failed to demonstrate that the scheme was perpetuated through the payment of funds from new investments to earlier investors.[68]

A plaintiff will typically seek to admit an affidavit of a forensic accountant, as well as any guilty plea related to the case, to demonstrate that an enterprise was operated as a Ponzi scheme.[69] As such, a fiduciary attempting to demonstrate a "Ponzi-like" scheme should engage the services of an expert in Ponzi schemes to assist the fiduciary in satisfying the evidentiary burden. A fiduciary such as a trustee or a receiver is often afforded greater liberty in adversary complaints because the

fiduciary "'pleads under a great disability due to his role as a third party outsider to the fraudulent transaction . . . [who] must plead fraud on second-hand knowledge for the benefit of the estate and all of its creditors.'"[70] Such liberty, however, does not excuse the failure of a fiduciary to present sufficient evidence to demonstrate the operation of a "Ponzi-like" scheme.

Impact of Legitimate Business Operations

The presence of a legitimate business within an investment scheme is not determinative.[71] Some courts have "found enterprises to be Ponzi schemes even when there is a legitimate, underlying business operation that manages to produce some amount of revenue."[72] Other courts analyzing a scheme involving some legitimate business have required a certain amount of facts to be plead with particularity. In *In re Equipment Acquisition Resources, Inc. (EAR)*,[73] for example, a plan administrator alleged that the leasing and financing transactions of the debtor were Ponzi-like. The operation did not constitute a classic Ponzi scheme because the transfers involved parties other than investors and because part of the operations of the debtor included a legitimate refurbishing and high-tech machinery sales business.[74] Ultimately, the court in *EAR* determined that the administrator "failed to allege sufficient facts to establish even a 'Ponzi-like' or similar fraudulent scheme with the required particularity."[75]

Given that Ponzi schemes have involved seemingly legitimate businesses, a party seeking to characterize an operation as a Ponzi scheme must typically demonstrate that returns to investors did not originate from any underlying business venture.[76] "If the debtor's legitimate business operations cannot fund the promised returns to investors, and the payments to investors are funded by newly attracted investors, then the debtor is operating a Ponzi scheme."[77] In instances where a debtor actually "operated a legitimate business in addition to engaging in activities with attributes of a Ponzi scheme, the plaintiff may be required to show that the funds plaintiff seeks to recover from investors are traceable to funds the debtor received from earlier investments."[78] Depending on the number of transactions associated with the scheme, the tracing analysis may impose a significant burden.

Examining the Nature of the Scheme

In addition to focusing on whether new funds were used to pay earlier investors, courts focus on the nature of the scheme. In *Gold v. First Tennessee Bank (In re Taneja)*,[79] a mortgage broker operated a legitimate and ordinary business for a number of years before perpetuating a significant fraud. The broker submitted false loan applications and created fraudulent loans that were each funded by an advance from a warehouse lender until each loan was acquired by a mortgage purchaser with funds that were then used to satisfy the advance.[80] The bankruptcy trustee of the mortgage broker argued that the fraudulent scheme was a Ponzi scheme and attempted to recover payments as fraudulent transfers.[81] The bankruptcy court ultimately concluded that the fraud did not have sufficient characteristics of a Ponzi scheme because the scheme did not include, among other things, unusually high rates of return or an increasing number of investors. The court in a detailed and well-reasoned opinion indicated that the mortgage broker "was a legitimate venture that included fraud, but the business venture itself was not fraudulent."[82]

Consequences of a Restrictive View of Scenarios That Do Not Constitute a Classic Ponzi Scheme

There are serious consequences if a court adopts a restrictive view of what constitutes a Ponzi. The court's determination may delay and impose additional expenses for the estate. Without the assistance of the Ponzi presumption by the court, the trustee in *Taneja* retained the burden of proving that *each* transaction sought to be avoided was in fact a fraudulent transfer.[83] In *Leonard v. Coolidge (In re National Audit Defense Network),*[84] the forensic expert for the trustee argued that the tax shelter scams of the debtor could be compared to a Ponzi scheme because the scheme offered unrealistic tax savings that customers knew could not be delivered as promised.[85] The court in *National Audit* disagreed and noted that the scheme was not a Ponzi scheme

since the debtor did not transfer funds from new investments to pay earlier investors.[86] Without the ability to rely on a presumption of actual intent, the court proceeded to determine through a traditional badges of fraud analysis whether the requisite actual fraudulent intent was present for each transfer based on circumstantial evidence.[87]

The failure of a court to recognize the Ponzi presumption leads to not only a time consuming badges of fraud analysis, but also causes an estate to perform the same analysis and incur the additional costs for each alleged fraudulent transfer.[88] In *MSI*, for example, a receiver sought to avoid conducting a separate badges of fraud analysis for each alleged fraudulent transfer by seeking an early determination that the debtor operated a Ponzi scheme that would be applicable in all ancillary proceedings in the case.[89] In refusing to apply the Ponzi presumption to the complex scheme involving over 200 entities with a maze of facts, transactions over many years, and the presence of Ponzi characteristics varying throughout the duration of the scheme, the district court noted that applying the presumption "in all securities fraud cases which have some Ponzi characteristics is inappropriate."[90] According to the restrictive approach adopted by the court in *MSI*, the presumption should be applied "only in those cases as blatant and as plain as the original Charles Ponzi case and the more recent Madoff case: assetless and fraudulent from day one."[91] Such a limitation is harmful to victims of Ponzi-like and similar illegitimate enterprises who must incur additional expenses in the form of increased administrative expenses by having to establish fraudulent intent for each alleged fraudulent transfer rather than being able to rely on a case-wide presumption.[92]

Conclusion

Even if a scheme does not have all the elements of a classic Ponzi scheme, a court may evaluate a "Ponzi-like" scheme to determine whether the scheme is in the nature of a Ponzi scheme and whether the fraudster conducted the scheme with the implicit understanding that the scheme would ultimately collapse and cause certain parties to incur losses. Case law in this area remains uncertain. It appears that establishing a "Ponzi-like" scheme may require sufficient evidence indicating that the scheme was perpetuated through a "Rob Peter to pay Paul" pattern involving the payment of funds from new deposits to satisfy earlier obligations. Specific factors that may be considered by a court will vary by jurisdiction but will generally involve the payment of obligations from newly-attracted deposits rather than from existing business operations.

References

1 S. Gregory Hays, the Managing Principal of Hays Financial Consulting, LLC, based in Atlanta, Georgia, has served as a federal and state court receiver in numerous jurisdictions across the country. In bankruptcy cases, he has served as Chapter 11 and 7 trustee and as a plan fiduciary. Eric J. Silva is an associate with Schulten Ward Turner & Weiss, LLP in Atlanta, Georgia with experience representing receivers and creditors in receiverships and creditors, committees, and court-appointed trustees in bankruptcy, reorganization, insolvency, and debtor/creditor matters. He has represented Mr. Hays in both receiver and trustee matters. The material set forth herein is provided for informational purposes only and does not constitute legal advice.

2 See Jonathan Stempel, U.S. Charges Harvard Grad Over Alleged Ponzi-Like Currency Scam, Reuters (June 2, 2016), available at http://wealthmanagement.com/legal/us-charges-harvard-grad-over-alleged-ponzi-currency-scam; United States v. Bick, No. 3:15-CR-00001 (JAM), 2016 WL 3410331, at *1 (D. Conn. June 20, 2016) ("The core of the Government's case was that defendant fraudulently misled people about the purposes for which he was using the money and that he perpetuated the fraud in a Ponzi-like fashion by repaying people in order to encourage them to give him still more funds under similar fraudulent pretenses.").

3 See Jordan D. Maglich, SEC: Pro Athletes Duped Out Of Over $30 Million In 'Ponzi-Like' Scheme (June 21, 2016), available at http://www.ponzitracker.com/main/2016/6/21/sec-pro-athletes-duped-out-of-over-30-million-in-ponzi-like.html (involving an investment advisor diverting funds of clients without authorization); Elliot Brown, SEC Alleges 'Ponzi-Like' Scheme in Vermont Involving EB-5 Visa Program, The Wall Street Journal (Apr. 14, 2016), available at http://blogs.wsj.com/law/2016/04/14/sec-suit-alleges-massive-ponzi-like-scheme-centered-near-vermont-ski-resort/ (involving a series of real-estate developments whereby funds from investors were used to satisfy deficits from earlier projects that the SEC indicated included some payments that were Ponzi in nature, but was characterized by the media as Ponzi-like).

4 See, e.g., S.E.C. v. Sun Empire, LLC, No. SACV 09-399 DOC 2010 WL 457237, at *1 (C.D. Cal. Feb. 3,

2010) (alleging "that Defendants have perpetrated a multi-level marketing, Ponzi-like scheme in which they solicit investors, falsely promise high returns on investments and misrepresent the nature of the investments, and then use the raised money to pay personal expenses and prior investors").

5 See Defendants' Notice of Motion and Motion to Dismiss and Memorandum of Points and Authorities in Support Thereof, Case. No. 8:15-cv-018520JLS-JC, 2015 WL 10058856 (C.D. Cal. Dec. 18, 2015) (noting that the failure to sufficiently establish a Ponzi scheme was not surprising since pleadings repeatedly characterized the "apparent fraud as merely 'Ponzi-like'").

6 See Finn v. All. Bank, 860 N.W.2d 638, 644-6 (Minn. 2015).

7 See Deangelis v. Rose (In re Rose), 425 B.R. 145, 152 (Bankr. M.D. Pa. 2010) ("One of the struggles in this case has been to find a clear definition of the term 'Ponzi scheme.'").

8 See SEC v. Mgmt. Solutions, Inc. (MSI), No. 2:11-CV-1165-BSJ, 2013 WL 4501088, at *7 (D. Utah Aug. 22, 2013).

9 See Gold v. First Tenn. Bank (In re Taneja), No. 08-13293-RGM, 2012 WL 3073175, at *7 (Bankr. E.D. Va. July 30, 2012), aff'd, 743 F.3d 423 (4th Cir. 2014) (finding that fraud on lenders and secondary market was insufficient by itself to demonstrate a Ponzi scheme).

10 Bear Stearns Sec. Corp. v. Gredd (In re Manhattan Inv. Fund) ("Manhattan Inv. Fund II"), 397 B.R. 1, 12 (S.D.N.Y. 2007).

11 In re Equip. Acquisition Res., Inc. (EAR), 483 B.R. 823, 834 (Bankr. N.D. Ill. 2012).

12 See Field v. Decoite (In re Maui Indus. Loan & Fin. Co.), No. CIV. 13-00091 JMS, 2013 WL 2897792, at *5 (D. Haw. June 13, 2013) (citation omitted).

13 See MSI, 2013 WL 4501088 at *7-21 (citation omitted).

14 Id. at *19 (citation omitted). This article does not attempt to conform the various definitions across circuits. While the treatment of a Ponzi scheme generally does not change solely based on whether a case involves a receiver or trustee, outcomes may vary across circuits and even within jurisdictions due to the use of varying definitions.

15 See In re Pearlman, 440 B.R. 900, 904 (Bankr. M.D. Fla. 2010) (indicating that an alleged bank fraud scheme involving the debtor obtaining bank loans from falsifying due diligence materials was not a Ponzi scheme since the lender was not an investor and the bank loans were not investments).

16 In re Equip. Acquisition Res., Inc., 481 B.R. 422, 431 (Bankr. N.D. Ill. 2012).

17 See Rieser v. Hayslip (In re Canyon Sys. Corp.), 343 B.R. 615, 629-30 (Bankr. S.D. Ohio 2006) ("Canyon's gold coin sales programs had all of the hallmarks of a classic Ponzi scheme.").

18 Id.

19 See Motion by Chapter 11 Trustee for Entry of Order Finding that Debtors Engaged in Ponzi Pyramid Scheme and Related Relief, Case Nos. 14-40987-MSH, Doc. No. 623, at *4 (Dec. 7, 2015).

20 See MSI, 2013 WL 4501088, at *19.

21 Id.

22 Id.

23 See Kathy Bazoian Phelps and Hon. Steven Rhodes, The Ponzi Scheme Book: A Legal Resource for Unraveling Ponzi Schemes, § 2.03[1][b] (2012) (providing a compilation of factors that courts consider).

24 See id.

25 See id.

26 See id.

27 See id.

28 MSI, 2013 WL 4501088, at *19.

29 See id. at *9-10.

30 See Janvey v. Alguire, 628 F.3d 164, 169 (5th Cir. 2010) (involving certificates of deposit allegedly offering above market returns whereby proceeds from new CD sales were used to issue payments to existing CDs).

31 See Greater Cmty. Bancshares, Inc. v. Fed. Ins. Co., 620 F. App'x 817, 819 (11th Cir. 2015) (involving allegations by trustee that debtor "had operated a fraudulent scheme similar to a Ponzi scheme that robbed 'Peter to pay Paul,' and had used DPS's money transfers made through GCB's bank to hide Payroll America's insolvency and defraud its creditors").

32 See In re SGE Mortgage Funding Corp., 298 B.R. 854, 857 (Bankr. M.D. Ga. 2003) (noting that a residential mortgage broker was a classic Ponzi scheme where the company would close mortgage loans with individual borrowers, assign such loans to numerous investors, and use funds from later investors to pay principal and interest payments due to earlier investors).

33 See Boyle v. Gray, 28 F.2d 7 (1st Cir. 1928).

34 See In re Pearlman, 478 B.R. 448, 454 (M.D. Fla. 2012).

35 See EAR, 483 B.R. at 834; Forman v. Salzano (In re NorVergence, Inc.), 405 B.R. 709, 730 (Bankr. D.N.J. 2009); United States v. Sudeen, 434 F.3d 384, 386-87 (5th Cir. 2005) (noting that investment programs to allegedly finance a plant constituted an elaborate Ponzi scheme whereby fraudsters represented that funds would be maintained in high-yield funds with above market returns).

36 See MSI, 2013 WL 4501088, at *7.

37 See Canyon Sys. Corp., 343 B.R. at 629-30.

38 See United States v. Benson, 79 Fed. Appx. 813, 817 (6th Cir. 2003) (consisting of a Gasoline Goes Multilevel Marketing program promising members 3% rebates on gasoline purchases even though the company did not have any contracts with gas suppliers).

39 See Eric Silva, Clawback Claims After the Collapse of a Ponzi Scheme, ComCom Quarterly, MBA Complex Commercial Litigation Section Newsletter (Winter 2015).

40 See In re Polaroid Corp., 472 B.R. 22, 55 (Bankr. D. Minn. 2012); S. Gregory Hays, Role of Forensic Accountant in Fraudulent Transfer Litigation, Chapter 5 of Fraud and Forensics: Piercing Through the Deception in a Commercial Fraud Case, American Bankruptcy Institute (2015).

41 See In re Bernard L. Madoff Inv. Sec., LLC, 2011 WL 3897970, at *4 (S.D. N.Y. 2011) (noting that actual intent is presumed under the Bankruptcy Code if the transfer furthers the scheme with an underlying fraud that constitutes a Ponzi scheme); Donell v. Kowell, 533 F.3d 762, 770 (9th Cir. 2008) (recognizing the Ponzi

presumption in an action by a receiver under the California Uniform Fraudulent Transfer Act); Wiand v. Lee, 753 F.3d 1194 (11th Cir. 2014) (recognizing the Ponzi presumption in an action by a receiver under the Florida Uniform Fraudulent Transfer Act).

42 See MSI, 2013 WL 4501088, at *20 (citation omitted); see also Phelps and Rhodes, The Ponzi Book: A Legal Resource for Unraveling Ponzi Schemes, § 2.03[1][a], at 2-6 (2012) (noting that the Ponzi scheme presumption greatly simplifies the burden of proof by eliminating the need to use customary badges of fraud).

43 MSI, 2013 WL 4501088, at *20.

44 See ("Bayou IV") (citation omitted).

45 See Manhattan Inv. Fund, Ltd. v. Bear (In re Manhattan Inv. Fund Ltd.), 310 B.R. 500, 506-507 (Bankr. D.N.Y. 2002) (citations omitted); Conroy v. Shott, 363 F. 2d 90, 92 (6th Cir. 1966), cert. denied, 385 U.S. 969 (1966) (noting that intent to defraud was not debatable in action by trustee of debtor who engaged in Ponzi type scheme to recover from defendant who made extensive loans to the debtor).

46 See Finn, 860 N.W.2d at 644-6 (considering claw back claims pursued by a receiver and holding that the Minnesota version of UFTA does not contain a Ponzi presumption); see also Janvey v. Golf Channel, Inc., 487 S.W.3d 560, 567 (Tex. 2016) (declining to express an "opinion regarding the validity of the Fifth Circuit's conclusive Ponzi-scheme presumption").

47 See Janvey v. Brown, 767 F.3d 430, 439 (5th Cir. 2014); Donell v. Kowell, 533 F.3d 762, 770 (9th Cir. 2008); Klein v. Cornelius, 786 F.3d 1310, 1320 (10th Cir. 2015); Wiand v. Lee, 753 F.3d 1194, 1201 (11th Cir. 2014).

48 Mark A. McDermott, Ponzi Schemes and the Law of Fraudulent and Preferential Transfers, 72 Am. Bankr.L.J. 157, 174–175 (1998).

49 See In re Bonham, 251 B.R. 113, 132 (Bankr. D. Alaska 2000) (indicating that experience and training qualified party to render an expert opinion in matter where reconstruction of poorly maintained and incomplete records was required for a suspected Ponzi-type business and finding that debtors were operated as a Ponzi scheme).

50 See Pearlman, 478 B.R. at 454 (holding in a motion to dismiss context that the Ponzi scheme presumption may apply outside of a traditional Ponzi scheme and to parties not involved in the scheme in the event that the plaintiff can demonstrate that the transfers were made in furtherance of a Ponzi scheme).

51 See Stoebner v. Ritchie Capital Mgmt., L.L.C. (In re Polaroid Corp.), 472 B.R. 22 (Bankr. D. Minn. 2012) (indicating a willingness to expand the Ponzi presumption to Ponzi-like schemes); EAR, 483 B.R. at 823.

52 In re IFS Fin. Corp., 417 B.R. 419, n. 15 (Bankr. S.D. Tex. 2009), subsequently aff'd, 669 F.3d 255 (5th Cir. 2012) ("When an organization perpetuating a fraud makes a transfer necessary for continuation of the fraud, the transfer is made with actual intent to defraud.").

53 See Bayou IV, 439 B.R. at 305 (citation omitted); Canyon Sys., 343 B.R. at 636-37 ("Actual intent to hinder, delay or defraud may be established as a matter of law in cases in which the debtor runs a Ponzi scheme or a similar illegitimate enterprise, because transfers made in the course of a Ponzi operation could have been made for no purpose other than to hinder, delay or defraud creditors.").

54 *See* Bayou Superfund, LLC v. WAM Long/Short Fund II, L.P. (In re Bayou Group, LLC), 362 B.R. 624, 633-4 (Bankr. S.D.N.Y. 2007) (adopting a broader scope of a Ponzi scheme and indicating that the presumption of actual intent is inescapable for scenario involving redemption payments of non-existent investment account balances and fictitious profits paid with funds of later investors).

55 See id. at 633.

56 Id. (citations omitted).

57 Id. (citations omitted).

58 In re Manhattan Inv. Fund Ltd., 310 B.R. 500, 509 (Bankr. S.D.N.Y. 2002) (citation omitted).

59 See NorVergence, 405 B.R. at 730 (inviting expansion of Ponzi presumption beyond scope of classic Ponzi without determining whether scheme constituted a Ponzi scheme).

60 See id. at 729-30.

61 See id. at 729-30.

62 Id. at 730.

63 Id.

64 See EAR, 483 B.R. at 834 (citation omitted); Brandt v. Plains Capital Leasing, LLC (In re Equip. Acquisition Res., Inc.), 502 B.R. 784, 790 (Bankr. N.D. Ill. 2013) ("[T]he court noted [previously] that some courts have expanded the Ponzi scheme presumption to schemes that are not within the definition of traditional Ponzi schemes . . .The court did not conclude, however, that this was a case in which such an expanded definition would apply.").

65 See Wing v. Dockstader, No. 2:08 CV 776, 2010 WL 5020959, at *6 (D. Utah Dec. 3, 2010), aff'd, 482 F. App'x 361 (10th Cir. 2012) (determining that defendant failed to establish a dispute to overcome forensic accounting of financial and business records, supporting testimony, and the opinion of an expert indicating that the scheme had Ponzi-like characteristics).

66 675 F.3d 524 (5th Cir. 2012) (holding that the district court erred in finding that the misuse of funds was part of a Ponzi-type scheme and, as such, the receiver was not relieved of burden to prove fraudulent intent).

67 See id. at 526–9.

68 See id. at 526-9.

69 See Stenger v. World Harvest Church, Inc., No. CIV.A.1:04CV00151-RW, 2006 WL 870310, at *11 (N.D. Ga. Mar. 31, 2006).

70 NorVergence, 405 B.R. at 730.

71 See In re Twin Peaks Fin. Servs., Inc., 516 B.R. 651, 655 (Bankr. D. Utah 2014).

72 Miller v. Kelley, No. 1:12-CV-00056-DN, 2014 WL 5437023, at *6 (D. Utah Oct. 27, 2014) (distinguishing MSI as a case involving both legitimate and illegitimate activity and finding that Ponzi presumption applied to all payments to transferee where receiver demonstrated that funds paid to investors did not originate from a source other than funds of other

investors).

73 483 B.R. 823 (Bankr. N.D. Ill. 2012).

74 See id. at 834 (citation omitted).

75 Id.

76 See MSI, 2013 WL 4501088, at *19; In re Taubman, 160 B.R. 964, 978-79 (Bankr. S.D. Ohio 1993) (declining to adopt argument of defendant that finding of Ponzi scheme should exclude legitimate activities of debtor such as the accounting and real estate practice of the debtor since the other activities of the debtor were known to investors who the debtor induced into investing by promising high returns, the debtor did not segregate funds, and payments of promised returns originated from new funds from investors rather than any legitimate business ventures).

77 Twin Peaks Fin. Servs., 516 B.R. at 655.

78 In re Vaughan Co., Realtors, 481 B.R. 752, 760 (Bankr. D.N.M. 2012) (citation omitted).

79 No. 08-13293-RGM, 2012 WL 3073175 (Bankr. E.D. Va. July 30, 2012), aff'd, 743 F.3d 423 (4th Cir. 2014) (affirmed on appeal without addressing application of Ponzi presumption).

80 See id. at *1-3.

81 See id.

82 Id. at 10.

83 See id.

84 367 B.R. 207, 214-5 (Bankr. D. Nev. 2007).

85 See id.

86 See id. at 219-22.

87 See id.

88 See MSI, 2013 WL 4501088, at *20.

89 See id.

90 Id. (emphasis in original).

91 Id. at *20-2.

92 See David R. Hague, Expanding the Ponzi Scheme Presumption, 64 DePaul L. Rev. 867, 900 (2015).

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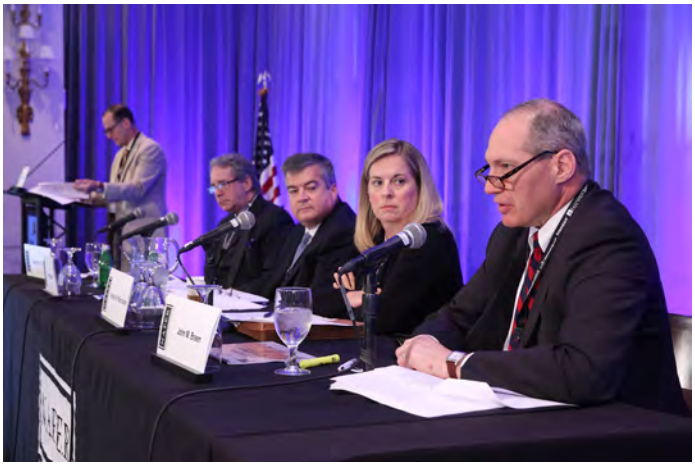
Irving H. Picard, Partner in the Creditor's Rights Group of Baker & Hostetler LLP and court-appointed SIPA Trustee for the liquidation of Bernard L. Madoff Investment Securities, LLC, gives an update on the Madoff case.



Ira Bodenstein (shown, far left) NAFER President Emeritus, and Member, Shaw Fishman Glantz & Towbin LLC, leads a panel discussion on Communication and Ethical Boundaries (produced by Terrence Banich, also a Member with Shaw Fishman, not pictured). Panelists included were (L to R): Stephen P. Harbeck, President & CEO, Securities Investors Protection Corporation (SIPC); Henry F. Sewell, Jr., Law Offices of Henry F. Sewell, Jr. LLC; Kristin W. Murnahan, Senior Trial Counsel, US Securities and Exchange Commission (SEC); John M. Breen, Professor of Law, Loyola University, Chicago.

NAFER Conference leaders join Keynote Speaker Lois C. Greisman (pictured, fourth from right), Associate Director, Division of Marketing Practices in the Federal Trade Commission's Bureau of Consumer Protection. Also shown are (left to right): Robert Mosier, Mosier & Co., NAFER Conference Chair; Michael Walters, Tranzon Asset Strategies (sponsor), Ira Bodenstein, Shaw Fishman Glantz & Towbin, NAFER President Emeritus; Tiffeny Cook, Tranzon Asset Strategies, Kenton Johnson, Robb Evans & Associates LLC and NAFER Board Member; Ms. Greissman, Greg Hays, Hays & Associates, President, NAFER; Peter Wessling, Tranzon Asset Strategies; Kevin Duff, Rachlis Duff Adler Peel & Kaplan LLC, NAFER Board Member and Co-Chair, Conference Programs Committee.

Conference Chair Robert Mosier (pictured, second from left) with his distinguished guests: Hon. Robert J. Shelby (D. Utah); Hon. Darrin P. Gayles (S.D. Fla); and Hon. David O. Carter (C.D. CA). These gentlemen made sure the 2016 conference would not soon be forgotten as they closed the conference with the always-popular Judges Panel.

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