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11th Circ. Affirms JPMorgan's Win Over Madoff Investors

By **Alex Wolf**

Law360, New York (August 10, 2016, 7:57 PM ET) -- The Eleventh Circuit on Wednesday affirmed a lower court's dismissal of claims brought against JPMorgan Chase by investors in Bernie Madoff's Ponzi scheme alleging it failed to report suspicious banking activities, ruling that a securities claim is time-barred and a racketeering claim precluded because it is based in securities fraud.

The panel decision puts to rest an appeal filed by Russell Dusek and several others, who claim that JPMorgan and two former employees were liable as control persons under federal securities laws given their banking relationship with Madoff and his former investment company, Bernard L. Madoff Investment Securities LLC. The investors also alleged that the bank violated the Racketeer Influenced and Corrupt Organizations Act.

According to the circuit court panel, the investors' Securities Exchange Act claim is time-barred because it was filed more than five years after Madoff was arrested and his company closed, and the RICO claim is barred because under the Private Securities Litigation Reform Act, a plaintiff cannot rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities as predicate acts in a civil RICO action.

"Appellees' claims of mail and wire fraud are clearly based upon the fraudulent conduct of Madoff and [Bernard L. Madoff Investment Securities] relating to securities investments," the court said. "The district court was therefore correct in dismissing the federal RICO claim because it is precluded by the PSLRA."

According to the opinion, the investors filed their claims in Florida federal court in 2014, seeking to hold liable JPMorgan, chief risk officer John Hogan and Richard Cassa, a client relationship manager for one of Madoff's accounts. They filed their claims after JPMorgan had already paid \$325 million in the Madoff Investment Securities bankruptcy and \$218 million in a **class action settlement**, for which the court certified a class whose definition was intended to include only "net losers."

The investors in the instant suit alleged the bank and its employees violated the Exchange Act and committed a RICO violation based on JPMorgan's investments in Madoff Investment Securities feeder funds and its failure to report suspicious banking activities to the U.S. Securities and Exchange Commission.

In September 2015, the lower court dismissed the Exchange Act and RICO claims with prejudice and declined supplementary jurisdiction for other counts brought under state law. The investors subsequently filed the instant appeal.

In affirming the dismissal of the securities claim, the circuit court rejected the investors' argument that the claim was tolled under the U.S. Supreme Court's 1974 decision in *American Pipe Construction v. Utah*, which allowed former class members who either intervene or file individual claims in another forum to toll their previous claims.

The panel said that "American Pipe tolling does not apply to the statute of repose at issue in this case," and that since the investors did not file the claim until the period of repose had expired, it is time-barred.

Speaking to Law360 on Wednesday, the investors' attorney, Lance Gotthoffer of Chaitman LLP, said he thought the tolling issue was wrongly decided and that his side plans to petition the Supreme Court to review the application of the American Pipe ruling to his clients' case.

"This is a very large and complicated issue that has split the federal courts, including the circuit courts, up and down," he said. "One way or the other, it's an issue that should be solved by the Supreme Court."

A representative for JPMorgan declined to comment Wednesday.

The plaintiffs are represented by Lance Gotthoffer and Helen Davis Chaitman of Chaitman LLP, and Nicole W. Giuliano of Giuliano Law PA.

The defendants are represented by John Ford Savarese, Scott M. Danner, Stephen R. DiPrima and Emil A. Kleinhaus of Wachtell Lipton Rosen & Katz, and by Carlos Juan Canino, Grace Lee Mead and Eugene E. Stearns of Stearns Weaver Miller Weissler Alhadeff & Sitterson PA.

The case is *Russell Dusek et al. v. JP Morgan Chase & Co. et al.*, case number 15-14463, in the U.S. Court of Appeals for the Eleventh Circuit.

--Additional reporting by Ed Beeson. Editing by Jack Karp.