

# Second Circuit Holds Bankruptcy Code's Avoidance Provisions Apply Extraterritorially

By **Leslie A. Berkoff**

On 25 February 2019, the Second Circuit Court of Appeals issued a decision in the case of *Picard*, trustee for the liquidation of Bernard L. Madoff Investment Securities LLC ("Madoff Securities"). The trustee alleged that Madoff Securities fraudulently transferred property to certain foreign feeder fund customers, who subsequently transferred it to other foreign entities. The trustee

sought to recover these funds from the appellees, contending that the transfers were avoidable as fraudulent conveyances pursuant to §548(a)(1)(A) of the Bankruptcy Code, and that they should thus be recoverable under §550(a)(2).

These actions were dismissed by the SDNY Bankruptcy Court, holding that the claims were barred based upon either the presumption against extraterritoriality application

of US statutes or international comity principles. However, the Second Circuit disagreed, holding that neither doctrine barred recovery in these actions.

The Circuit Court reasoned that §550(a) works in tandem with §548(a)(1)(A) in regulating the debtor's fraudulent transfer of property. Thus, the focus of §550(a) was on the debtor's initial transfer of funds from the US, and not on the subsequent transfer to other foreign entities. The court rejected the lower court's holding that the subsequent transaction was the appropriate extraterritoriality question, and instead found that the initial transfer was determinative because it was the only transfer actually made by the debtor.

Absent such a ruling, the court recognised that a fraudster could simply transfer assets to a foreign entity in order to render the transfer recovery proof. Thus, where a domestic debtor commits fraud by transferring property from a US bank account, the conduct that §550(a) seeks to regulate is conduct that takes place domestically. Consequently, the lower court erred by dismissing these actions under the presumption against territoriality because they involve a domestic application of the statute.

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