

## **Blog posting on Bernard Madoff**

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"Bernard Madoff's admission in his plea allocution that he operated a Ponzi scheme is bad news for those who redeemed investments from his fund. Courts have found that criminal admissions of a fraudulent scheme to defraud investors made in plea allocutions are admissible as direct evidence of "actual intent" to defraud creditors. This is significant because under Section 548(a)(1)(A) of the Bankruptcy Code, a trustee may clawback the principal and fictitious profits of any redemption that was made with "actual intent" to defraud creditors.

Madoff's allocution details how he operated the fraud. This will be good evidence for any forensic accounting expert to track down how accounts were fraudulently calculated and specific assets transferred.

In the recent Bayou hedge fund case, Judge Adlai S. Hardin used the plea allocutions of the hedge fund officers to decide that investor redemptions were fraudulent and, therefore, subject to clawback.

Those Madoff investors who should worry are those who withdrew their assets since December 15, 2002, six years before the trustee was appointed. This is because Section 544 of the Bankruptcy Code allows the trustee to rely on state law to clawback fraudulent conveyances. New York, where the fund was located, has a six year statute of limitations on fraudulent conveyances.

While those investors who had redeemed will be upset, they must keep in mind that Section 548 is not a punitive provision designed to punish them. Rather it represents a determination by Congress that redeeming investors should be in the same position as other similarly situated investors who did not redeem. Regardless, they may come to wish that Madoff had said nothing."