

Corporate & Financial Weekly Digest

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Suit Arising Out of SEC's Failure to Detect Madoff Ponzi Scheme Barred by Sovereign Immunity

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The U.S. District Court for the Southern District of New York granted defendant United States' motion to dismiss a complaint brought by former investors in the investment advisory firm Bernard L. Madoff Investment Securities LLC (BMIS) seeking money damages under the Federal Tort Claims Act (FTCA) for losses suffered by plaintiffs in connection with the Ponzi scheme perpetrated by Mr. Madoff and BMIS.

The complaint, derived substantially from the Securities and Exchange Commission Office of Inspector General's 457-page report, entitled "Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme," alleged that the SEC was grossly negligent in carrying out its supervisory duties over the securities industry when it failed to uncover Mr. Madoff's Ponzi scheme despite numerous credible and detailed warnings between 1992 and 2008, and several investigations undertaken by the SEC into Mr. Madoff's and BMIS's trading activity.

In granting the United States' motion, the district court found that plaintiffs' claims were within the FTCA's discretionary function exception and barred by sovereign immunity. The court reasoned that the scope, manner and results of investigative activity undertaken by the SEC is "inherently discretionary and policy-driven," and the complaint failed to sufficiently allege any relevant statutory obligations that required the SEC to undertake a more thorough investigation into BMIS. (*Molchatsky v. United States*, 2011 WL 1471798 (S.D.N.Y. Apr. 19, 2011))

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