OPINION | COMMENTARY

Ponzi's Foundation for Madoff's Pyramid

Courts used 20th-century precedents to resolve claims over a 21st-century swindle.

By Randy Maniloff
April 15, 2021 6:27 pm ET

Disgraced Wall Street financier Bernie Madoff leaves court after a hearing in New York, March 10, 2009.
PHOTO: STAN HONDA/AGENCE FRANCE-PRESSE/GETTY IMAGES

Bernie Madoff, who died Wednesday at 82, is inevitably remembered for running the biggest Ponzi scheme in history. Which makes his death a reminder of the life of Charles Ponzi (1882-1949).

Beginning in 1919, Ponzi, a Boston resident, offered to pay investors, within 45 days, $150 for every $100 they lent him. The immigrant from northern Italy credited this spectacular promised return on investment to arbitrage in international postal coupons. These were vouchers that could be enclosed with international letters. The recipient would redeem the voucher for his own country's stamps and affix them to a reply.

Ponzi told would-be lenders that differences in international exchange rates enabled him to buy and sell the coupons and make a hefty profit. You know how this ended.

But while Ponzi didn't make an honest return, he did help to make law. His name became not only an eponym but a Supreme Court case, and the aftermath of his scam led to a second ruling by the justices.

In 1921, Ponzi was in federal prison in Massachusetts serving a five-year sentence after pleading guilty to mail fraud. A state court in Suffolk County directed that he be brought before it to stand trial for larceny. Ponzi objected, maintaining that as long as he was in federal custody, the court lacked jurisdiction to prosecute him on state charges.

In *Ponzi v. Fessenden* (1922), the justices ruled against him. Chief Justice William Howard Taft declared that a "penitentiary is not a place of sanctuary" and concluded that "delay in the trial of accused persons greatly aids the guilty to escape because witnesses disappear, their memory becomes less accurate, and time lessens the vigor of officials charged with the duty of prosecution."

Fallout from Ponzi's scheme reached the high court two years later. The issue was what to do about Ponzi's lenders, whose money, without interest, had been returned to them after the fraud came to light. The trustees had sought possession of this money for the benefit of all victims.

Taft sided with the trustees, concluding in *Cunningham v. Brown* (1924) that those who received back their loan amounts had enjoyed an impermissible benefit at the expense of the "dupes" who felt "the effects of Ponzi's insolvency." In bankruptcy, the chief justice declared, there is a principle that "equality is equity."

Massive litigation followed Madoff's unraveling in an effort to locate money and repay investors. As for the method to divvy it up, a New York bankruptcy court concluded in 2010 that it should be based on the amount of money an investor deposited with Madoff, less withdrawals. The court rejected the idea of considering the fictitious balances on the investors' statements, a procedure which would have benefited some who realized imaginary gains.

The judge cited *Cunningham v. Brown* in concluding that Madoff's victims were equally innocent, and "equality is equity." A federal appeals court affirmed. If Ponzi set a precedent for Madoff, so did Chief Justice Taft.

Mr. Maniloff is an attorney at White & Williams LLP in Philadelphia and an adjunct professor at Temple University's Beasley School of Law.

Appeared in the April 16, 2021, print edition.