

Court Upholds Investor Settlement In Fraud Case

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In a complex commercial litigation case with some unusual twists and turns, a federal bankruptcy court granted summary judgment to a Chapter 7 trustee and three investment firms on fraudulent transfer and other claims brought by two groups of investors defrauded by Craig Berkman, a former prominent businessman and politician in Oregon.

Bailey Glasser represented the three investment firms in the lawsuits. Craig Berkman formed the three investment firms in the late 1990s and raised approximately \$75 million from investors for the purpose of investing in start-up companies in Oregon. His activities turned out, however, to be a wide-ranging Ponzi scheme.

Berkman diverted millions of dollars from the funds into his own personal accounts and used a portion of the funds to pay off prior investors. After wresting control from Berkman, the three investment funds sued Berkman in Oregon. A jury returned a verdict against Berkman and his related entities in the aggregate amount of \$30 million.

After chasing Berkman to Florida, the investment funds filed involuntary Chapter 7 bankruptcy proceedings against Berkman and one of his related entities in the United States Bankruptcy Court for the Middle District of Florida. Two years into the bankruptcy case, the investment funds employed Bailey Glasser to oversee various interrelated pieces of commercial litigation against Berkman and his affiliates.

Eventually, Berkman settled with the funds and the Chapter 7 bankruptcy trustee in May 2012, paying them approximately \$6 million in total in exchange for releases and satisfaction of judgments as well as some other miscellaneous stock and other property.

But in March 2013, almost a year after the settlement closed, the United States Attorney for the Southern District of New York made a surprise announcement. He had indicted Berkman on charges of fraud, alleging that Berkman had bilked another 120 investors out of approximately \$13.2 million in schemes relating to the Facebook initial public offering and other high-profile IPOs and used a portion of the new investors' funds to fund the prior bankruptcy settlement.

COURT UPHOLDS INVESTOR SETTLEMENT IN FRAUD CASE

Following the announcement, two groups of the newly bilked investors sued the Chapter 7 trustee and the investment funds in the Florida bankruptcy court to recover their investments. They alleged the settlement payments constituted voidable fraudulent conveyance under the Florida Uniform Fraudulent Transfer Act. They also asserted a variety of equitable claims under Florida law to recover the money.

After extensive discovery, each side moved for summary judgment. In the 28- page opinion issued on September 29, the Bankruptcy Court ruled that the newly defrauded investors had no right to recover the allegedly “stolen” funds from the Chapter 7 trustee or the investment funds or other creditors.

Both the trustee and the investment funds had accepted the payments in good faith, without knowledge of Berkman’s fraud, and had given reasonably equivalent value in exchange for the settlement payments, thus defeating any claims the newly defrauded investors might make. The Bankruptcy Court, therefore, entered summary judgments on Oct. 7 in favor of the trustee and the investment funds, authorizing both to distribute the settlement funds in their possession.

One group of the new investors appealed the judgments and moved for a stay of the judgments pending appeal. After the Florida district court denied the appellants’ motion for a stay pending appeal, concluding, among other things, that the investors had demonstrated little likelihood of success on the merits of their appeal, the investors withdrew their appeal.

Kevin W. Barrett, a bankruptcy attorney and commercial litigator at Bailey Glasser’s New York office, and Rodney A. Smith, a commercial litigator at Bailey Glasser’s Charleston, West Virginia, office, led the firm’s representation of the investment funds and developed and implemented the overall strategy for resolving the litigation.

Attorneys

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Practice Areas

Bankruptcy & Business Reorganization