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As 'Clawback' Suits Loom, Some Investors Seek Cover

BY JANE J. KIM

Investors who lost money with financier Bernard Madoff are girding for potential "clawback" suits that might be brought by the trustee in charge of liquidating Mr. Madoff's firm.

Such suits, which would seek to reclaim funds that some investors pulled out and redistribute them, are prompting some investors to protect their remaining assets by transferring them to irrevocable trusts, homes, annuities or life-insurance policies, according to attorneys.

The alleged Madoff fraud is now being viewed as a classic Ponzi scheme in which new money from some investors was used to fund withdrawals of fictitious profits for other investors. The trustee, Irving Picard, has said he would go after—or claw back—the profits of investors who withdrew far more money than they contributed to **Bernard L. Madoff Investment Securities**. Mr. Picard said he intends to distribute clawed-back funds to investors who were wiped out. A spokesman for Mr. Picard wasn't immediately available.

Under the bankruptcy code, those who will be most susceptible to a clawback are investors who withdrew any money in the 90 days before Mr. Madoff's arrest on Dec. 11, attorneys say.

Those who invested in Madoff through feeder funds like **Fairfield Greenwich Group** and **Tremont Group Holdings** could be in a better position to fend off clawback suits since the trustee, among other things, would have to "trace" the funds to the end in-

vestors, says bankruptcy partner Philip Bentley of New York, who represents Madoff investors.

New York state law allows Mr. Picard to seek funds transferred from Mr. Madoff's firm in the past six years. Investors may be asked to give back profits and potentially some of their initial investments to help offset losses by other investors.

That is what happened in a similar case by hedge-fund company Bayou Group LLC, which imploded in 2005. The federal bankruptcy court compelled investors who had pulled money out of Bayou to return some of their principal—in addition to any profits—to help offset losses by other investors.

Hundreds of investors regularly took money out of the Madoff firm, many to live on. Some in 2008 pulled out bigger amounts than usual because money was tight during the deepening recession.

People are "shaking" with concern over having that money pulled back, says Jerome Reisman, a Garden City, N.Y., lawyer who represents about a dozen Madoff investors. He says that some investors have resisted filing claims to the Madoff trustee in bankruptcy court because they believe it will increase the likelihood of having some of their phantom gains clawed back to pay other investors.

Attorneys say it is likely that some Madoff investors are pursuing a variety of strategies to protect their assets from the trustee. Few are likely to trumpet them, since such moves could be viewed as a fraudulent conveyance, the illegal transfer

of property with the intent to commit fraud.

Robert Klueger, a Los Angeles attorney whose firm specializes in asset protection, says he is working with several Madoff victims. Mr. Klueger wouldn't go into specifics about his clients, but he says the trustee's ability to go after a person's assets will depend on a number of factors. Money in a qualified pension plan such as a 401(k) generally is protected from creditors, he says. He said investors worried about a clawback should continue to make contributions to those plans, up to the annual contribution limits, since those plans have "pretty good asset protection."

Some Madoff investors also are counting on the Securities Investor Protection Corp. to reimburse them for losses. Indeed, SIPC began paying out investor claims this week for the first time and has so far advanced \$6 million to pay 12 claims at \$500,000 each to people who recently deposited money, according to SIPC's president and chief executive, Steve Harbeck.

Other investors are trying to get relief from the Internal Revenue Service by deducting their losses as ordinary "theft losses," which could be used to offset other income, or by trying to get back taxes they paid in prior years on "phantom income," or income they reported on their tax returns that never existed. Indeed, under congressional legislation proposed Wednesday, Rep. Gary Ackerman proposed allowing investors to seek refunds on phantom income since 1995.

—Aaron Lucchetti
contributed to this article.